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JOSEPH WOJTACH,
Plaintiff - Appellant,
v.
SAM LA ROUSSA, JR.,
Defendant - Appellee.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

20 I.A. 21 141


MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a personal injury case. Trial by jury resulted in a verdict of not guilty for defendant. Judgment was entered accordingly. Plaintiff's post trial motions were denied and he appeals.

About 5:30 P.M. on December 22, 1955, plaintiff, a pedestrian, was injured in an occurrence involving defendant's automobile at the intersection of North Avenue, an east-west street, and Hoyne Avenue in Chicago. He was walking from the north side of North Avenue on the east side of Hoyne Avenue toward the south side of North Avenue, when he came into contact with defendant's automobile, which was traveling west on North Avenue.

There is a conflict of evidence as to whether plaintiff was walking within the marked crosswalk or east of it and as to how far out in the street plaintiff was at the time of the collision.

From a careful examination of the record we think this was a close case and it was necessary to instruct the jury properly in the respective theories. See Masters v. Central Ill. Elec. & Gas Co., 15 Ill. App.2d 95; Sharp v. Brown, 349 Ill. App. 269.



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Plaintiff

Defendant contends that instructions 17 and 15 were erroneously prejudicial and that the trial court improperly curtailed the argument of plaintiff's counsel.

Defendant's instruction 17 reads:

You are instructed that in the event you find that the plaintiff, at the time of the occurrence complained of, was in the act of crossing a public street at a crosswalk, then it was the duty of the defendant to exercise ordinary care to grant to the plaintiff the right-of-way, and likewise, the duty of the plaintiff to exercise ordinary care to give to the defendant a reasonable opportunity to grant to the plaintiff the right-of-way.

The Illinois Uniform Traffic Act, Ill. Rev. Stat. 1957, ch.

95-1/2 § 171(a), provides:

(a) Where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield; to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection, except as otherwise provided in this article.

Instruction 17 fails to adequately explain the application of the statute to the instant case and its last clause is confusing. In Taylor v. Ries, 3 Ill. App.2d 256, the court in commenting on an instruction similar to the one in controversy here said:

Whether the jury believed plaintiff's or defendant's version of the occurrence we think, in either event, the instruction was misleading for the reason that the degree of care and caution required to be exercised by each of the parties was not equal.

Since defendant's instruction 17 misstates the law in that it places the pedestrian under a duty which is not imposed by the statute, it is erroneously prejudicial.

Plaintiff also complains that defendant's instruction 15 is a "sudden danger" instruction and not applicable to the facts of this case. The instruction reads as follows:

2/4/59

You are instructed that if from the evidence that at the time of the occurrence complained of, the defendant was exercising ordinary care, and that while the defendant was doing so, if he was, the plaintiff, at the time of the injury suddenly and unexpectedly, and without the knowledge of the defendant, proceeded from a position of safety into a position of danger, then, in order to charge the defendant with a duty to avoid injuring the plaintiff, the plaintiff must show by a preponderance or greater weight of the evidence that the circumstances were of such a character that the defendant had a reasonable opportunity, in the exercise of ordinary care, to become conscious of the facts giving rise to such duty, and a reasonable opportunity, in the exercise of ordinary care, to perform such duty.

An instruction very similar to that quoted was condemned in Rees v. Spillane, 341 Ill. App. 647 at page 662 because it ignored ". . . the duty of a motorist to keep a lookout for a pedestrian who may rightfully be upon a crosswalk at an intersection." We agree with plaintiff that the evidence does not justify the inference that plaintiff "suddenly and unexpectedly thrust himself into a place of danger." Testimony of both parties indicates that both were aware of each other's presence. The error in the "right-of-way" instruction is compounded by the "sudden danger" instruction. See Reese v. Buhle, 16 Ill. App.2d 13, where at page 21, the court stated that:

This [sudden danger] instruction has been held erroneous when applied to a motorist confronted by a pedestrian It is inconsistent with the principle which we have here again enunciated that a motorist approaching a crosswalk must be on the alert for pedestrians.

While courts have become more lenient with minor errors in instructions, the general rule still prevails that errors in instructions will compel reversal unless the record affirmatively shows that the instruction was not prejudicial. See Duffy v. Cortesi, 2 Ill.2d 511. In our opinion the errors here were prejudicial and require reversal.

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The record shows that plaintiff was of Polish extraction and required an interpreter. During the trial a controversy arose with regard to the proper interpretation of an answer to a question propounded to plaintiff and the court curtailed the argument of plaintiff's counsel on this point. Since the cause will be retried, it is unlikely that the question will arise again.

For the reasons given the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

MURPHY AND KILEY, JJ. CONCUR.

ABSTRACT ONLY.

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47438

CENTRAL ICE CREAM CO., an Illinois Corporation,

Plaintiff-Counter-Defendant
and Appellee,

v.

UNIVERSAL LEASEWAY SYSTEM, INC., a Michigan corporation (formerly known as Reo Truck Leasing, Inc.),

Defendant-Counter-Plaintiff
and Appellant.

17
20 I.A. 145
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.
21
20 I.A. 145

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a declaratory judgment action, in which plaintiff dismissed its complaint and successfully moved to strike defendant's counterclaim, on which defendant elected to stand. Defendant, as counter-plaintiff, appeals from the judgment order, which dismissed its countersuit and awarded costs to the plaintiff, as counter-defendant.

On April 9, 1954, the parties hereto entered into a "Vehicle Lease and Service Agreement," whereby Central (plaintiff) hired from Universal (defendant) thirty-six motor vehicles for use in hauling plaintiff's ice cream. Thirty-two vehicles were leased for eight years and four for six years. The lease provides that Central may terminate the agreement by (1) notice, and (2) purchasing the vehicles on the cancellation date at the initial retail selling price, less depreciation.

On December 26, 1956, Central served on Universal a notice, which purports to terminate the lease agreement in accord-

ance with its terms, and electing to return the vehicles and equipment "in view of the unenforceability of the repurchase option." It also states that the agreement was being terminated specifically because of Universal's failure to maintain the vehicles in accordance with the lease. Both parties have construed the notice termination date to be April 9, 1957.

On December 28, 1956, Central filed this suit. The complaint includes the lease, with details, and alleges that Universal violated and breached the lease, and has refused to comply with its terms, although Central has completely performed its lease undertakings; and that blanks in Schedule A, which related to the vehicle purchase price formula, were completed by Universal in excess of and in violation of authority conferred by Central. It requests the court to enter a declaratory judgment that the lease was effectively terminated by Central's notice, and also requested that the purchasing provisions be declared void and unenforceable.

Universal answered and counterclaimed, incorporating by reference the lease agreement pleaded by Central. It alleged that Universal has performed its part of the agreement; that Central has refused to perform its part and has served notice of termination; and asked the trial court to determine and adjudicate the rights and liabilities of both parties under the vehicle lease and to enter a declaratory judgment, construing the agreement and determining that Universal has not violated the terms and provisions of the agreement, and that said agreement is in full force and effect. It also asked the court to determine that there is due Universal the sum of \$158,111.73, as the adjusted purchase price of the vehicles, and to retain jurisdiction for the purpose of entering further orders subsequent to the declaration of rights.

Central answered the counterclaim and Universal replied. Central then dismissed its complaint without prejudice. Universal petitioned for an early hearing, alleging great financial loss, due to the unsalability of the special type vehicle.

Central also filed a motion to strike and dismiss, because (1) the counterclaim does not state a cause of action; (2) that the claim for the alleged purchase price is based on a promise, which is in violation of the Statute of Frauds, Section 4, Illinois Sales Act, and therefore unenforceable; and (3) the original declaratory judgment complaint having been dismissed, the cause of action of Universal, if any, is but a common law action for the purchase price, under an alleged contract of sale, and should be placed on the common law jury calendar. After a hearing, the court entered an order sustaining the motion to strike.

We do not agree with the contention of Universal that when Central amended the caption of its motion to strike to read "Motion to strike and dismiss under Section 48 of the Civil Practice Act," it eliminated from consideration the other grounds set forth in the motion, which include the question of the counterclaim being sufficient for declaratory judgment action. The name by which the motion is designated is not controlling. (Barrett v. Continental Ill. Nat. Bank & Trust Co., 2 Ill. App. 2d 70 (1954).) The motion is sufficient to test the counterclaim on other grounds set forth, but not included under Section 48.

A considerable portion of both briefs is devoted to the question of interpreting the lease termination provisions as an

agreement to purchase and its enforceability. We shall not discuss these points, because we have come to the conclusion that Central had an option to purchase, which was not exercised. The provision in question gave Central a right to terminate the lease, without liability, if it (1) served notice, and (2) purchased the vehicles in accordance with a price formula, which we believe was sufficiently set out in the lease, without disputed insertions. These were conditions precedent to termination by Central. If Central wanted to terminate the contract without the consent of Universal, by availing itself of the termination provisions of the contract, it should have complied with the conditions of the contract precedent to the exercise of the right. (Hale v. Cravener, 128 Ill. 408 (1889); 12 I.L.P., sec. 342, p.489.) This it did not do. It was an ineffective attempt to terminate the lease, but it did not result in any obligation of Central to buy the vehicles.

The principal question is whether the counterclaim is sufficient to comply with the Declaratory Judgment Act, Section 57.1.

The notice served by Central was a repudiation of the lease, and the refusal to continue the use of the vehicles or to pay for their hire was a breach for which Universal, therefore, had a cause of action.

When Central filed its complaint for a declaratory judgment, Universal properly filed its counterclaim in the same action. It is desirable, as the Civil Practice Act makes clear, that all matters in dispute between the parties are to be disposed

of in a single action, where it is possible to terminate the litigation. The dismissal by Central of its complaint did not end Universal's right to continue under the Declaratory Judgment Statute, if the controversy arose out of the same action, and presented a case, properly pleaded, for invoking the jurisdiction of the court to render a declaratory judgment, bottomed on a good cause of action.

The granting of declaratory relief on a counterclaim is now recognized as common practice. The fact that a plaintiff is not entitled to the precise relief sought, or because the court disagrees with plaintiff's construction of the contract involved, is not sufficient to dismiss a declaratory complaint. The complaint in an action for declaratory relief, which recites in detail the legal dispute between the parties and prays for a declaration of rights and other legal relations of the parties, states facts sufficient to constitute a cause of action against a motion to dismiss for insufficiency of the complaint. (Civil Practice Act, sec. 57.1; Burgard v. Mascoutah Lumber Co., 6 Ill. App. 2d 210, 218; Anderson, Actions for Declaratory Judgments, Vol.1, secs. 313 and 324.) Construction of a contract is a proper type of action under the Declaratory Judgment Act, even though plaintiff requests and the court grants money damages or other incidental relief. (Crerar Clinch Coal Co. v. Board of Education, 13 Ill. App. 2d 208.) Unless it appears to a certainty that the plaintiff is entitled to no relief on the stated facts, which could be proved, the complaint must be sustained. United States v. Cattaraugus Co., 67 F. Supp. 294, 298 (1946).

The filing of the complaint by plaintiff was an admission that an actual controversy was involved. The counterclaim sets forth the same controversy with a request that the court determine the rights and liabilities of both parties under the lease and to retain jurisdiction in order to effect a full termination of the controversy. We believe Universal's counterclaim does state a good declaratory judgment cause of action, sufficient to bring it within the provisions of Section 57.1 of the Civil Practice Act.

Attorneys for Central argued orally that, although Universal may have a cause of action, the relief sought was improper and, therefore, fatal to the counterclaim.

We understand that the scope of the declaratory judgment remedy should be kept wide and liberal and not restricted by technicalities. The thing of importance is the right and duty of the courts to grant declaratory relief where, in the interest of the proper administration of justice, it ought to be granted, regardless of how the particular action in which the declaratory relief sought may be classified. This is one of the advantages of the procedure.

The instant counterclaim states an actual controversy and requests the court to determine and adjudicate the rights and liabilities of both parties. This is sufficient. If, in determining the rights and liabilities, Universal is able to prove that it is entitled to a money judgment, it will be the duty of the court to determine and grant such further relief as is necessary and proper.

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Reversed and remanded, with directions to overrule the motion to dismiss and to proceed in accordance with the views expressed herein.

REVERSED AND REMANDED
WITH DIRECTIONS.

LEWE, P. J., and KILEY, J., CONCUR.

ABSTRACT ONLY.

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A. ALFRED WATTS,

Appellant,

v.

GREATER BETHESDA MISSIONARY BAPTIST
CHURCH, an Illinois Religious
Corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

1 20 I.A. 2d 146 1

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued to recover salary alleged to be due for breach of a written contract by defendant. After answer and reply, the court entered an order for summary judgment in favor of defendant, from which plaintiff appeals.

It appears from the pleadings that the defendant church was organized on November 30, 1937, with an initial membership of 117. Plaintiff was the first and only pastor of the church from the date of its organization to June 5, 1953. The contract of employment is embodied in a letter under date of October 19, 1937, addressed to plaintiff by William J. Walker, chairman of the board of trustees, and reads as follows:

"Greater Bethesda Missionary Baptist Church of Chicago, Illinois, a religious corporation, having extended to you a call to become its pastor, it becomes our duty as trustees of said church to enter into a contract with you for payment of your services.

"We hereby offer and agree to pay you for your services Sixty (\$60.00) Dollars per week for the first year with the understanding and agreement that just as soon as our finances will warrant it during the first year, to increase your salary. We realize that your services will be worth more than Sixty (\$60.00) Dollars per week and we therefore agree to make an increase in the payment of your salary just as soon as we are financially able to do so.

"We hope that you will accept the call to the pastorate of the Greater Bethesda Missionary Baptist Church under the agreement herewith made, and that you will please indicate your acceptance of the call to the pastorate of the Greater Bethesda Missionary Baptist Church of Chicago, Illinois, by signing the acceptance and returning to us a copy of this communication."

Plaintiff accepted the pastorate, in writing, "under the terms of the agreement above stated." Subsequently his salary was raised to \$125 per week. He was discharged as pastor by a majority vote of the congregation on June 5, 1953.

Defendant's motion for summary judgment is supported by accompanying affidavits containing various charges as to the pastor's conduct over several years following his employment. These charges relate to his desertion of his first wife and their subsequent divorce; to cruel treatment of his second wife; to fights and disturbances in his apartment which alarmed the neighbors and resulted in his eviction; to his close association with an ex-convict who caused the pastor to be arrested and prosecuted for the alleged crime of impersonating a policeman and carrying a pistol, with attendant adverse publicity to the church in newspapers and on radio; to plaintiff's indictment by the Federal government on charges of fraud; to the keeping of an automatic revolver in the church office; and to plaintiff's attempts on two occasions to kill William J. Walker, chairman of the board. Such a course of conduct, the defendant church asserted, split its membership into two hostile factions and ultimately resulted in numerous members leaving the parent church and organizing a congregation of their own. In the view we take, plaintiff's

contention that, to use his terminology, "extraneous, irrelevant and prejudicial material" presented in defendant's pleadings constituted issues of fact to be determined upon trial, is of secondary importance, since the contract for plaintiff's personal services as pastor on a weekly salary for an indefinite period of time was a hiring which was terminable, with or without cause, at the election of either party. Numerous cases in this State support this conclusion; see *Orr v. Ward*, 73 Ill. 318; *Joliet Bottling Co. v. Brewing Co.*, 254 Ill. 215; *Fuchs v. Weibert*, 233 Ill. App. 536; *Marquam v. Domestic Engineering Co.*, 210 Ill. App. 337; and *Gage v. Village of Wilmette*, 315 Ill. 328. Decisions of other states are to the same effect; see *Watson v. Gugino*, 98 N.E. 18, and *Duff v. P.T. Allen Lumber Co.* (Ky.), 220 S.W.2d 981.

Aside from charges of conduct unbecoming a pastor, plaintiff contends that summary judgment should not have been entered because the pleadings and affidavits presented issues of fact that should have been tried by the court; among them, the questions whether the meeting at which he was discharged was held pursuant to notice as provided in the by-laws of the congregation, whether he was ready, willing and able to perform his duties and meet the responsibilities of his employment, whether he was prevented from performing his duties during the existence of his contract, and whether he was without employment for a period of three months.

To show that plaintiff had notice of the meeting called for the purpose of discussing the termination of his services and whether he had an opportunity to participate in the meeting, the defendant church attached to its motion for summary judgment the certified minutes of the special church meeting held May 11, 1953 at which it was arranged, in plaintiff's presence, that a special meeting be held June 5, 1953 to vote on the termination of his services; also attached were the certified minutes of the special meeting of June 5, 1953 which disclosed that before the meeting plaintiff came to the door of the assembly hall and stated that the congregation did not know what it was doing, and that he then went upstairs to the church office where he remained during the entire meeting, refusing to accede to the urging of a church committee that he come down to the meeting to defend himself against the charges preferred against him.

Plaintiff's claim for back salary is without merit. It appears that defendant had procured an injunction against plaintiff in another proceeding which was dissolved on the ground that the court had no jurisdiction over an ecclesiastical controversy between the parties. In that case the injunction was subsequently dissolved on October 15, 1953, and the pastor's damages (including \$3253.00 representing attorney's fees and costs) were assessed at \$4253.00 by the Circuit Court. This sum was paid to him, and the Circuit Court clerk certified the satisfaction of the amount of the judgment and costs. In this suit plaintiff seeks re-imbursement for salary which he alleges is unpaid, but the amount of damages awarded him upon

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dissolution of the injunction included a salary award, and as we read the record plaintiff is not entitled to any further payment.

We are of the opinion that the summary judgment was properly rendered on the affidavits of defendant and the counter-affidavit of plaintiff, and therefore the judgment is affirmed. Costs, including those incurred through the necessary filing of additional abstract, are taxed against plaintiff.

JUDGMENT AFFIRMED; COSTS
TAXED AGAINST PLAINTIFF.

BRYANT and BURKE, JJ., CONCUR.

ABSTRACT ONLY.


IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT - SECOND DIVISION
OCTOBER TERM, A. D. 1958WILLIAM W. THOMPSON, et al.,
Plaintiffs-Appellees,

-vs-

JOHN MAJCHER, et al.,
Defendants-Appellants20 I.A. 146²²
Appeal from the
Circuit Court of
DuPage County.FILED
JAN 13 1959
PAUL V. WUNDER
Appellate Court Second District

CROW, J.

The plaintiffs, William W. Thompson and Florence E. Thompson, his wife, brought suit for damages suffered as a result of the alleged removal by the defendants, John Majcher and Anthony B. Majcher, of certain top soil from certain land of the plaintiffs in or near Hinsdale, DuPage County. After a trial by jury, a judgment was entered on the verdict in favor of the plaintiffs and against the defendants in the sum of \$2,953.50. Motions of the defendants for directed verdicts were denied, as was their motion for new trial. The death of one of the plaintiffs, Florence E. Thompson, was suggested, and Chicago Title and Trust Co., as trustee under a certain trust of which the plaintiff William W. Thompson is sole beneficiary, was added as a party plaintiff. The defendants contend that the verdict is against the manifest weight of the evidence. As there are no other arguments on appeal by the defendants, it will be necessary to review the evidence, which is substantially as follows, so far as material:



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William W. Thompson, one of the plaintiffs, owned Lots 10, 11, and 12, in W. W. Thompson's Subdivision in DuPage County, Illinois. They lie on the west side of Park Avenue at 55th Street, Hinsdale, - Lot 10 being at the northwest corner of the intersection, and the other lots extending north therefrom. Each lot is about 100' wide north-south and 200' deep east-west. In the latter part of 1952, Mr. Thompson, who was then retired and living in California, came to Illinois from California and made a routine inspection of the three lots and observed that they were normal, - they were in their natural state. Again, in March, 1953 he returned to Illinois and at that time observed two houses under construction on the two lots immediately north of his lots. The two lots immediately north had been previously sold by Mr. Thompson through a broker, Mrs. Pesslee, to the two defendants. He also observed an extensive excavation upon his three lots, the excavation being about 150' x 287' and 18 to 24 inches deep, and that the two lots of the defendants to the north had been filled some four or five feet above their former level, their former level having been somewhat lower than the plaintiff's lots, and were beautifully landscaped. He testified he called at the house immediately north of his property, asked for John Majcher, and talked to a man he supposed was John Majcher and who said he was John Majcher, one of the defendants, and that Majcher told him that he (Majcher) had removed the dirt from Mr. Thompson's lots, but that Mrs. Pesslee, the real estate broker, had given him permission, and that he, John Majcher, would replace the black dirt that he had taken. Mrs. Pesslee, according to Mr. Thompson, had no connection with the subject except as to the sale some time before of the two lots to the defendants. Mr.

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Thompson next saw the lots in the fall of 1953 at which time some clay had been dumped in the excavation and a thin layer (less than an inch) of black dirt over the clay, which rains had washed down.

John Majcher testified that he had never met or talked with Mr. Thompson; that his house was not immediately north of Thompson's lots, but was immediately north of the lot of his brother, Anthony Majcher; that he had not received any top soil from Mr. Thompson's property, and did not know anything about the removal of top soil from Mr. Thompson's lots.

Anthony Majcher testified that his and his brother's two lots were purchased from Mr. Thompson and that he and his brother had built two houses on these two lots, that they built the houses by contract at the same time, and that their excavators were one Busema and another person by the name of Higgins. He testified that he asked Mrs. Peaslee, the real estate broker, about piling excavated dirt from the defendants' lots on Mr. Thompson's property during construction and that she said they could do this; that he was present when this dirt, a considerable amount, was pushed over from their two lots onto the Thompson property; that it covered an area 25-50 feet south on to the plaintiff's lots and extending 200 feet east to west, and that Higgins, one of the excavators, later pushed it back over on to the Majcher lots to level off the property. He said that Busema, the other excavator, moved some of the dirt from Mr. Thompson's property to their property, that these excavator men were under his (Anthony Majcher's) direction, that he and his brother were generally present in the afternoons when this soil was moved back, and that the soil moved back was their own soil.

The defendants did not see any other tractors or anybody else moving dirt in the area whom they did not recognize. They denied taking any top soil from the plaintiff's property, and denied admitting they had taken any, but Anthony admitted having a conversation with the plaintiff and agreeing to fill in the excavation on the plaintiff's lots. The defendant Anthony's explanation of his admitted agreement to fill in the excavation on the plaintiff's lots was so that there would be no water seepage and such would enhance and beautify the plaintiff's and defendant Anthony Majcher's property. He acknowledged having had a conversation with Mr. Eschmann, a plaintiff's witness, but denied having told him he had removed top soil from the plaintiff's land. He said he never saw the excavation on the plaintiff's property referred to by Mr. Luwaerter, a plaintiff's witness.

Henry Eschmann, Fire Chief in the Village of Hinsdale, testified that he had formerly been engaged in contracting work and had occasion to have a conversation with Anthony Majcher in March of 1953, in the latter's house; that Anthony Majcher told him that the real estate woman, meaning Mrs. Peaslee, gave him (Anthony Majcher) permission to remove the dirt; that one Busena was his excavator; and that he (or Busena) took some of the black dirt off of the Thompson property; that he hoped Mr. Thompson did not want to make anything out of it; and Mr. Eschmann said he observed tractor marks indicating that dirt from the plaintiff's property had been pushed over on to the adjacent property.

Le Luwaerter was a witness for the plaintiffs and testified that he was in the business of excavating, earth removal and selling of fill and black dirt; that he was familiar with the

The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. The Commission has received information from the Government of the United States regarding the activities of the Communist Party in the United States. The Commission has received information from the Government of the United States regarding the activities of the Communist Party in the United States.

reasonable market price of top soil or black dirt in and around DuPage County in the latter part of 1952 and the early part of 1953; that he walked over the property of Mr. Thompson, being the three lots in question, shortly before the trial and found that the (Majcher) lots to the north were filled in about three feet higher than the plaintiff's lots, that the size of the area of the plaintiff's lots that was stripped, cut, or excavated, was about 100' x 290', the depth of the cut, or black soil removed, was 1', he dug down to ascertain the depth of the excavation and it was one foot, the cubic yardage of the excavation was 1074 yards, and that it was his opinion that the fair and reasonable price for such black top soil at that time was \$2.75 a yard, (delivered, but not spread). For 1074 cubic yards that is \$2953.50. He said that at the rear of the plaintiff's lots was an area which had not been stripped and which had on it the original black top soil and that black soil was one foot deep.

There is a sharp conflict in some of the testimony, and it is peculiarly for the jury in such a situation to pass upon the credibility of the witnesses, to determine if there was any misrepresentation on the part of the plaintiff, or of either defendant, or the other witnesses, to weigh the evidence, and to decide from it and the reasonable inferences to be drawn therefrom where the preponderance of the evidence lies. To the extent some of the evidence is circumstantial it was competent, relevant, and admissible, and it was for the jury to determine its weight and significance under all the facts and circumstances in evidence. There definitely was an excavation of a considerable size on the plaintiffs' lots. The plaintiffs had not themselves done that ex-

cavating, or had it done. The defendants had unquestionably been engaged in a large amount of excavating and dirt moving on their lots to the north which admittedly involved moving much dirt from those lots on to the plaintiffs' lots and then back on to the defendants' lots. The potential possibility in such a situation of some of the plaintiffs' own soil from his own lots being moved, intentionally or inadvertently, over to the defendants' lots is apparent. Mr. Thompson talked with one or the other of the defendants about the excavation, and their versions of that conversation are conflicting in part. The trier of the facts had to determine who was to be believed. Both of the defendants were present generally during the course of the construction of their two houses and had actual knowledge of and are chargeable with knowledge of their excavators' activities. Mr. Bachmann had a conversation with Anthony Majcher, and their versions of that are also conflicting to some extent. Again, the trier of the facts had to decide which version was correct. Anthony Majcher admittedly did agree to fill in the excavation on the plaintiffs' lots and did in part do so. Whether that was out of a feeling of responsibility on the defendants' part, or was for the reasons Anthony Majcher testified to, or was for no reason, were matters for the jury to consider and determine. His statement at one point that he never saw the excavation on the plaintiffs' property referred to by Mr. Auwaerter is, to say the least, somewhat incredible, and apparently conflicts with other parts of his own testimony. No effort was apparently made by the defendants to prove any actual authority in Mrs. Fleaslee, the real estate agent, from Mr. Thompson, and from aught that appears here the acts of the defendants as to the plaintiffs' real estate were completely

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unauthorized and hence trespasses. No one else was doing any dirt excavating or moving in that area. The defendants' excavators, Busena and Higgins, were not called as witnesses, and, they having been employed by the defendants, it would seem there was more of a burden on the defendants than the plaintiffs to call them if what they might have testified to would have tended to support the defendants. Their testimony as to exactly what they did on the plaintiffs' lots might have cast some further light on this matter. Their not being called as witnesses was a proper factor, among others, for the jury to consider.

The plaintiffs cite the case of DICK vs. ZIMMERMAN (1903)

105 Ill. App. 615, where the Court stated, page 616 -

"Here was a clear conflict in the evidence. When that is the case it is the peculiar province of the jury to determine the preponderance and credibility of the evidence. O'BRIEN vs. PALMER, 49 Ill. 72. When an appellate court is asked to set aside a verdict, the prevailing party is entitled to all the favorable inferences legitimately arising from the evidence. HESS vs. ROSENTHAL, 55 Ill. App. 324."

The trial court considered these same questions on the defendants' motions for directed verdicts and for new trial and denied the motions. We are not disposed to disagree.

The defendants have cited no cases or other authorities on any proposition upon which they urge a reversal here, or in response to the points and authorities of the plaintiffs. On the other hand, the plaintiffs' brief discloses well established authority for allowing the plaintiffs to recover from the defendants the value, in its severed condition, of the soil removed from their lands, if it was so removed by the defendants. They cite the case of CITIZENS NATIONAL BANK vs. JOSEPH KESL & SONS COMPANY, et al. (1942) 378 Ill. 428, a case involving damages for

the removal of soil, and where the Court said, p. 433-434:

"It is established that where one wrongfully removes soil from land of another, the latter may recover the value of the soil in its severed condition. SIRES vs. MOLINE CONSUMERS CO., 293 Ill. 112; DOX- OVEN vs. CONSOLIDATED COAL CO., 187 Id. 28; PIPER vs. CONNELLY, 108 Id. 646; WASHINGTON ICE CO. vs. SMITHALL, 101 Id. 46; ILLINOIS AND ST. LOUIS RAILROAD AND COAL CO. vs. GALE, 82 Id. 627; ROBERTSON vs. JONES, 71 Id. 4051."

The cause of action here is for damages by trespass to real estate in wrongfully excavating and carrying away top soil therefrom, comparable to the common law action of trespass quare clausum fregit, and in such an action, if it is maintainable, the plaintiff is entitled to a recovery, as damages, of the chattel value of the property removed incident to the trespass: CITIZENS NATIONAL BANK vs. JOSEPH KIEB and SONS CO. et al., supra. There is sufficient proof, we believe, in the testimony of Mr. Thompson and Mr. Auwaerter, that the condition of the plaintiffs' property with reference to the alleged removal of top soil was substantially the same in the fall of 1957 just prior to the trial, when Mr. Auwaerter made his examination, as in March, 1953, when or about when the excavation had evidently occurred, except for the subsequent filling in of a certain amount of clay therein apparently by one or both of the defendants. The calculation of 1074 cubic yards of top soil excavated and removed does not appear unfair to the defendants. Though conceivably, as the defendants suggest, many things might have intervened in the interim there was no evidence anything did in fact intervene except the partial clay filling in referred to. That Mr. Thompson's estimate of the extent of the excavation on his lots, - 150' x 287' x 18 to 24 inches, - is somewhat larger than Mr. Auwaerter's estimate, - 100' x 290' x 1', - is not of great significance and did not in any way prejudice the defendants, inasmuch as the jury apparently accepted Mr. Auwaerter's lesser estimate.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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The second section of the report is a list of names of persons who have been convicted of crimes in the State of New York. The list is arranged in alphabetical order of the names of the persons. The names are given in full, including the name of the person, the name of the crime, and the name of the court. The list is as follows:

ALBANY, N. Y. - 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544,

We cannot say the verdict is against the manifest weight of the evidence, and we perceive no error of law. The judgment should be, and is hereby affirmed.

AFFIRMED.

Wright, P. J. Concur.

SOLFISBURG, J. CONCURS

It is hereby certified that the within and foregoing are true and correct copies of the original as the same appear in the records of the Board of Health of the City of New York.

WITNESSES

Wright P. F. Bennett

SECRETARY, N. Y. BOARD OF HEALTH

501

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10206

Agenda No. 18

Kathryn E. (Kay) Read,

Plaintiff, Appellant,

vs.

H. Clay Tate and Josephine Tate
and John R. Ryan and Walter B.
Stoutamoyer, d/b/a/ Ryan Realty
Company,

Defendants-Appellees.

Appeal from the
Circuit Court of
McLean County.

20 LA 147²³ 1

REYNOLDS, J.

Kathryn E. (Kay) Read, the plaintiff, brought her suit against H. Clay Tate and Josephine Tate, the defendants, for a real estate broker's commission growing out of the sale of real estate owned by the defendants. Upon motion of the defendants, the real estate broker firm of John R. Ryan and Walter B. Stoutamoyer, doing business as Ryan Realty Company, were made co-defendants to the suit. The only evidence heard was on behalf of the plaintiff, and on motion of the defendants for a directed verdict in favor of the defendants, the trial court allowed the motion, gave an instruction for a verdict for the defendants and entered judgment on the verdict.

A

STATE OF IOWA
JANUARY 1908

101

General No. 12308

General No. 12308

Kathryn E. (Kay) Reed,

Plaintiff, vs.

vs.

H. Clay Tate and Josephine Tate
and John E. Ryan and Walter B.
Ryan, d/b/a Ryan Realty
Company,

Defendants.

Appears from the
Circuit Court of
Iowa County.

201A-147

REVEREND, J.

Kathryn E. (Kay) Reed, the plaintiff, brought her suit
against H. Clay Tate and Josephine Tate, the defendants, for
a real estate broker's commission growing out of the sale of
real estate owned by the defendants. Upon motion of the
defendants, the real estate broker firm of John E. Ryan and
Walter B. Ryan, doing business as Ryan Realty Company,
were made co-defendants to the suit. The only evidence
heard was on behalf of the plaintiff, and on motion of the
defendants for a directed verdict in favor of the defendants,
the trial court allowed the motion, gave no instruction for
a verdict for the defendants and entered judgment on the verdict.

From that judgment the plaintiff appeals to this court.

There is not much dispute as to the facts. The plaintiff was a licensed real estate broker. The defendant Ryan Realty Company, was also a licensed real estate broker firm. Mr. and Mrs. George Hoel were interested in purchasing a home and on November 17th, 1956 the plaintiff drove them by the home of the defendants J. Clay Tate and Josephine Tate. At that time the plaintiff had had no contact with either Mr. or Mrs. Tate, but discussed with the prospects, Mr. and Mrs. Hoel the possibility of looking at the Tate home. Later, on November 26, 1956, the plaintiff contacted J. Clay Tate and at his office told him she had a prospect for the purchase of his home, and was given permission to show the home to her prospects, Mr. and Mrs. Hoel. An appointment was made to show the home on November 28, 1956. At the meeting of the plaintiff and defendant Tate in his office on November 26, 1956, the price of the home and the commission of the plaintiff was discussed. The defendant Tate wanted \$27,000 for the home, and the plaintiff informed him that in order to realize the usual and customary commission of 5% she would be required to price the home at \$28,350. On November 28, 1956, the plaintiff took Mrs. Hoel to the Tate home. They were met by Mrs. Tate who showed them through the residence and arrangements were made for the showing of the home to Mr. Hoel later on the same day. At about 6:00 o'clock p.m. the plaintiff took Mr. and Mrs. Hoel back

From that judgment the plaintiff appeals to this court.
There is not much dispute as to the facts. The plaintiff
was a licensed real estate broker. The defendant upon being
Company, was also a licensed real estate broker firm. Mr. and
Mrs. George Noel were interested in purchasing a home and on
November 17th, 1935 the plaintiff drove them by the home of
the defendants J. Clay Tate and Josephine Tate. At that time
the plaintiff had had no contact with either J. or Mrs. Tate,
but discussed with the prospective Mr. and Mrs. Noel the
possibility of looking at the late home. Later, on November 23,
1935, the plaintiff contacted J. Clay Tate and at his office told
him she had a prospect for the purchase of his home, and was given
permission to show the home to her prospective Mr. and Mrs. Noel.
An appointment was made to show the home on November 24, 1935.
At the meeting of the plaintiff and defendant Tate in his office
on November 24, 1935, the price of the home and the commission of
the plaintiff was discussed. The defendant Tate wanted \$37,500 for
the home, and the plaintiff informed him that in order to realize
the usual and customary commission of 5% she would be required to
price the home at \$39,375. On November 25, 1935, the plaintiff
took Mrs. Noel to the late home. They were met by Mrs. Tate who
showed them through the residence and arrangements were made for
the showing of the home to Mr. Noel later on the same day. At
about 8:00 o'clock p.m. the plaintiff took Mr. and Mrs. Noel back

to the Tate home and at this time they were met by both Mr. Tate and Mrs. Tate and were shown through the home. The plaintiff and Mr. and Mrs. Hoel remained at the Tate home about one and one half hours and during this time discussed the purchase of the home. The Hoels asked for several days time to consider if they were interested in the purchase of the Tate home. Two days later, on the 30th of November 1956, plaintiff contacted Mr. and Mrs. Hoel and was informed that they would pay \$25,000 for the Tate home. This offer was conveyed to the defendant H. Clay Tate and at that time, he informed the plaintiff he would not accept the offer of \$25,000. The plaintiff then informed Mr. Tate she would continue in her efforts to effect a sale and would again talk to her prospects and try and get them to increase their offer. The plaintiff testified that she did contact Mr. and Mrs. Hoel on December 1st, December 7th and December 10th, 1956, endeavoring to get them to increase their offer. On December 5th, 1956, defendant H. Clay Tate made a trip with defendant John R. Ryan, a real estate broker, and the matter of selling the Tate property was discussed by them. Later, on December 6th or 7th, 1956, a salesman for the John R. Ryan Realty Company, contacted Mr. Hoel relative to purchase of the Tate property, and this salesman took the Hoels to the Tate property and they again looked at the home. At that time the salesman was informed, both by Tate and the Hoels that the plaintiff had the same prospects for the purchase of the Tate home and had made an offer of \$25,000 for it.

to the Tate home and at this time they were met by both Mr. Tate and Mrs. Tate and were shown through the home. The plaintiff and Mr. and Mrs. Noel remained at the Tate home about one and one-half hours and during this time discussed the purchase of the home. The Noel's asked for several days time to consider if they were interested in the purchase of the Tate home. Two days later, on the 30th of November 1956, plaintiff contacted Mr. and Mrs. Noel and was informed that they would pay \$25,000 for the Tate home. This offer was conveyed to the defendant H. Clay Tate and at that time, he informed the plaintiff he would not accept the offer of \$25,000. The plaintiff then informed Mr. Tate she would continue in her efforts to effect a sale and would again talk to her prospects and try and get them to increase their offer. The plaintiff testified that she did contact Mr. and Mrs. Noel on December 1st, December 7th and December 10th, 1956, endeavoring to get them to increase their offer. On December 24th, 1956, defendant H. Clay Tate made a trip with defendant John T. Ryan, a real estate broker, and the matter of selling the Tate property was discussed by them. Later, on December 24th or 25th, 1956, a salesman for the John T. Ryan Realty Company, contacted Mr. Noel relative to purchase of the Tate property, and this salesman took the Noel's to the Tate property and they again looked at the home. At first time the salesman was informed, both by Tate and the Noel's that the plaintiff had the same prospect for the purchase of the Tate home and had made an offer of \$25,000 for it.

On December 14th 1956, a contract for sale of the Tate home was entered into by defendants Tate and Mr. and Mrs. Hoel for purchase of the Tate home for \$26,000. At the same time an indemnification agreement was entered into between H. Clay Tate and his wife and John R. Ryan, indemnifying the Tates from any liability to the plaintiff growing out of her efforts to sell the Tate property to the Hoels.

It does not appear that Mr. and Mrs. Hoel at any time authorized the plaintiff to offer over \$25,000. There is evidence that the plaintiff suggested to defendant H. Clay Tate that he take \$26,000, but, so far as the plaintiff is concerned, this suggestion was refused by the defendant Tate.

In reviewing the record and the evidence it is clear that all parties to the ultimate sale, namely John R. Ryan, his salesman Ross, the sellers H. Clay Tate and wife and the buyers George Hoel and wife, were fully advised and cognizant of the efforts of the plaintiff to effect the sale of the property to George Hoel and wife. The prospective claiming of a broker's fee by the plaintiff was recognized by the drawing up of the indemnification agreement. The defendant Tate, refused the suggestion of the plaintiff that he take \$26,000 for the home, but later through another real estate broker, did accept the sum of \$26,000. The purchasers, George Hoel and wife, acting through the plaintiff, refused to increase their offer of \$25,000, but did increase their offer through the other real estate broker to \$26,000.

On December 14th 1936, a contract for sale of the Tule home was entered into by defendant Tule and Mrs. Noel for purchase of the Tule home for \$25,000. At the same time an information agreement was entered into between Tule and his wife and John E. Ryan, indicating that Tule from any liability to the plaintiff growing out of her efforts to sell the Tule property to the plaintiff.

It does not appear that Tule and Mrs. Noel at any time authorized the plaintiff to offer over \$25,000. There is evidence that the plaintiff suggested to defendant Tule that he take \$25,000, but, so far as the plaintiff is concerned, this suggestion was refused by the defendant Tule.

In reviewing the record and the evidence it is clear that all notice to the plaintiff sale, namely John E. Ryan, his wife and Mrs. Noel, the sellers in Tule's sale and the buyers George Noel and wife, were fully advised and cognizant of the efforts of the plaintiff to effect the sale of the property to George Noel and wife. The prospective obtaining of a purchase from the plaintiff was recognized by the defendant Tule of the information agreement. The defendant Noel, released the suggestion of the plaintiff that he take \$25,000 for the home, but later through another real estate broker, did accept the sum of \$25,000. The purchase, George Noel and wife, acting through the plaintiff, released to increase their offer of \$25,000, but did increase their offer from the other real estate broker to \$25,000.

The only evidence produced at the trial was that in behalf of the plaintiff. The trial court held that insufficient and allowed the motion for a directed verdict. The sole question thus presented to this court, is whether this evidence on the part of the plaintiff standing alone, and taken with all its intendants most favorable to the plaintiff, tends to prove the material elements of the plaintiff's cause. If it did, then the granting of the motion to direct a verdict was error. If it did not, the granting of the motion was proper.

The trial court in remarks to the jury instructing a verdict for the defendants, pointed out that the plaintiff in order to earn a commission had to provide the seller with a buyer who was ready, able and willing to purchase the property. And apparently, the trial court, in directing the verdict, believed that because the plaintiff had not been able to get the bargaining parties together on an agreed price, even though the same parties later, did agree upon a price not much more than originally offered, she had failed to provide a buyer ready, able and willing to buy. In the remarks of the trial court to the jury in instructing a verdict for the defendants, the court said that there was no further contact, as indicated by the record, after Mr. Tate had turned down the offer of \$25,000, so far as the plaintiff's efforts were concerned. In this the court was in error. It is true that the plaintiff did not contact Mr. Tate after he turned down the offer of \$25,000. She did, however, on November 26, 1956, at Tate's office suggest to Mr. Tate that he

The only evidence presented to the trial was that of the plaintiff. The trial court said that the defendant allowed the action for a judgment verdict, the defendant was presented to this court, the defendant was advised on the facts of the plaintiff's standing alone, and taken with all the facts and circumstances, to the plaintiff, could to prove the plaintiff's claim of the plaintiff's claim. It is also the granting of the action to direct a verdict was error. It is also not, the granting of the action was proper.

The trial court is remanded to the jury instruction. A verdict for the defendant, directed that the plaintiff is liable to bear a commission and to provide the sales with a proper commission, and also willing to purchase the property. The defendant, the trial court, in directing the verdict, directed that the plaintiff had not been able to get the property of the plaintiff on an agreed price, even though the defendant had agreed upon a price and then originally offered, and had failed to provide a proper price, and was willing to pay. It is the remand of the trial court to the jury in instruction a verdict for the defendant, the court said that there was no evidence, as indicated by the record, that the defendant had any interest in the property, as far as the plaintiff's claim was concerned. In this the court was in error. It is true that the plaintiff had no interest in the property, but the court was in error. The court was in error. The court was in error. On November 28, 1900, at New York, the action was brought to the court.

accept \$26,000. She continued in her efforts to effect a sale by seeing the Hoels on December 7th and December 10th and urging them to raise their offer to \$26,000. (Abstract pp.10.)

The plaintiff brought the sellers and the purchasers together. She urged the defendant Tate to accept \$26,000 and urged the purchasers to raise their offer to \$26,000, which was not accepted by either of the parties, but later the sale was made on the \$26,000 basis. Based on those facts, was the plaintiff the procuring cause of the sale? Whether the services of a broker were the procuring cause of the sale is clearly a question of fact for the jury. Scheske v. Wiechert, 2 Ill. App. 2d. 331; Martin v. Equitable Life Assur. Soc. of U.S., 323 Ill. App. 69; Wood v. Brown, 330 Ill. App. 613.

The case of Doss v. Kirk, 8 Ill. App. 2d 536, presents facts analogous to the instant case. In the Doss v. Kirk case, the broker brought the prospective purchaser and the owners together in an endeavor to make the sale. Here, the plaintiff brought the Tates and the Hoels together in an endeavor to make a sale. In the Doss v. Kirk case, the owners asked \$16,000, and the prospective purchaser offered \$12,500. Here the owner asked \$27,000 plus the broker's commission, and the prospective purchasers offered \$25,000. In the Doss v. Kirk case the original offer made through the plaintiff was refused by the owner, as in this case, and later, through no effort on the part of the broker, the parties negotiated a sale between themselves for \$15,000.

accept \$20,000. She continued in her efforts to obtain a sale by
selling the house on several 7th and 8th streets 10th and 11th
to make a sale offer to \$10,000. (Exhibit 17, 18.)

The plaintiff brought the suit and the parties together.

The house the defendant was to accept \$20,000 and under the purchase
to make their offer to \$20,000, which was not accepted by either of the
parties, but later the sale was made on the \$20,000 basis. Based on
those facts, was the plaintiff the prevailing owner of the house?

Whether the parties of a house was the prevailing owner of the house
is clearly a question of fact for the jury. See Wright v. Wright, 211
Ky. 561, 211 Ky. 561, 211 Ky. 561, 211 Ky. 561, 211 Ky. 561.
See Wright v. Wright, 211 Ky. 561, 211 Ky. 561, 211 Ky. 561.

The case of Wright v. Wright, 211 Ky. 561, 211 Ky. 561, 211 Ky. 561.

According to the facts of the case, in the Wright v. Wright case, the house
brought the prospective purchaser and the owner together in an
endeavor to make the sale. Here, the plaintiff brought the house and
the roof together in an endeavor to make a sale. In the Wright v. Wright
case, the owner asked \$10,000, and the prospective purchaser offered
\$12,500. Here the owner asked \$20,000 plus the house's commission,
and the prospective purchaser offered \$20,000. In the Wright v. Wright
case the original offer was through the plaintiff and refused by the
owner, as in this case, and later, through an effort on the part of the
plaintiff, the parties negotiated a sale between themselves for \$10,000.

The contention of the defendants in the Doss v. Kirk case, was that the evidence for the plaintiff failed to establish the existence of a contract of employment of the broker, and that if such existed it had been abandoned or revoked. Here the contention was that the evidence failed to show that the plaintiff had produced a buyer, ready, able and willing to buy. The facts and circumstances in the two cases being so similar, the law as laid down in the Doss v. Kirk case, is peculiarly applicable to the facts in this case. The court in that case said: "It is the settled law that to create the relationship of agency between a broker and the owner of property, a contract of employment is necessary. However, no particular form is required in such contract and ordinarily all that is necessary is that the broker act with the consent of his principal whether such consent is given by written instrument, orally, or by implication from the conduct of the parties. I.L.P. Brokers Sec. 22; Greenwald v. Marcus, 3 Ill. App. 2d 495. Purgett v. Weinrank, 219 Ill. App. 28." And later in the Doss v. Kirk case, the court said: "The only other question remaining for consideration is whether plaintiff was the procuring cause of the sale made by the defendants to Dalton. The evidence on that issue is that decedent produced Dalton as a prospective purchaser; that defendants came into contact with Dalton on May 13 when he was being shown through the house by plaintiff; that after making the offer of \$12,500 which was refused, Dalton and the defendants continued negotiations which ended in the sale of the

The contents of the statement in the 1942-43 year, was that
the witness had been classified under the provisions of
a contract of employment of the Government, and that it was stated in
the statement of the witness, that the statement was that the
witness tried to show that the plaintiff was innocent of any
crime, and was willing to say, that there was no connection in the
two cases being an attempt, and that the fact was that the
case, is specifically applicable to the facts in this case. The witness
in this case said: "It is the witness's own view in making the statement
that he speaks of the fact that he was not at present a witness
of anything in connection with the plaintiff's case is that he
is not guilty and certainly all that is necessary is that he
has not also the content of the plaintiff's statement, and he
is given by the witness, which, as he has stated from the
content of the witness, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 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property to Dalton; that the sale contract between defendants and Dalton was executed six days after the defendants refused Dalton's first offer.

"Where a real estate broker shows that he has been instrumental in bringing parties together and the transaction is consummated, he is to be regarded as the procuring cause of the sale and entitled to his commission. *Crilly v. Young*, 152 Ill. App. 72; *Camp v. Hollis*, 332 Ill. App. 60. It is sufficient if the sale is effected through the efforts of the broker or through information derived from him. *Hafner v. Herron*, 165 Ill. 242; *Hawkins v. Taylor*, 186 Ill. App. 355. Application of the above rules to the evidence in the instant case would seem to compel the conclusion that plaintiff adequately met the burden resting upon him of introducing proof showing that the sale of defendants' property resulted from decedent's efforts in bringing the defendants and the purchaser together. This proof shows that decedent produced Dalton who was interested in purchasing the defendants' property and any information which defendants had concerning such purchaser came from the decedent. Since the evidence further shows a sale to have been made by defendants to Dalton within a few days after decedent communicated his offer to defendants, there can be no question concerning the willingness or ability of Dalton to purchase the property. Under the particular facts of this case the test is whether the sale of defendants' property as consummated resulted from decedent's efforts in bringing the purchaser and the defendants together. We think plaintiff's

evidence met such test and accordingly plaintiff made out a prima facie case."

Applying the law of that case to the instant case, there can be no dispute as to the following: 1. The plaintiff was instrumental in bringing the sellers and the purchasers together. 2. The original offer of the purchasers was rejected, but the sale was later consummated at a figure only slightly higher than the first offer. 3. There was an implied contract between the sellers and the plaintiff, for sale of the property, which if consummated, would entitle her to a commission. 4. The sale was consummated by the parties within a few days after the original offer had been rejected. 5. The fact that the purchasers paid \$26,000 established that the purchasers were able and willing to purchase the property.

The fact that the purchase price, as finally agreed upon between the sellers and the buyers, was higher or lower than the price first asked or offered is not decisive. If the plaintiff was the procuring cause of the sale, she would be entitled to her commission.

As said in the case of Hannen v. Snodgrass, 13 Ill. App. 2d 538, "The law is well settled in this state that the fact that the seller consummates a sale, or that it is made upon different terms from those proposed to the broker, does not necessarily deprive the broker of compensation. If he is the efficient procuring cause of the transaction he is entitled to his commission." Whether the plaintiff here was the efficient procuring cause of the transaction

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may be considered as a question of fact, based upon the evidence, and as such should have been submitted to a jury.

The law of the cases cited by the defendants is not applicable to the instant case for several reasons. In the case of Drobnick v. Old Line Life Ins. Co., 320 Ill. App. 232, there was no contract of employment between the seller and the broker. The case of Thomas v. Morris, 314 Ill. App. 570, cited by the defendants is an abstract opinion. However, a reading of the full opinion shows that the court in that case, sustained a finding by the Master as to the allowance of a commission to two brokers, Morris and Thomas, who worked jointly to sell the property. The court in that case held that Morris and Thomas were the procuring cause of the sale and that they were entitled to a commission. The court in the case of Chicago Title & Trust Co., v. Guild, 323 Ill. App. 608, while holding that an owner may employ one or more brokers to sell real estate, also held that the broker who is the efficient cause of the sale is entitled to the commission. In the case of Coleman v. Stein, 320 Ill. App. 136, the court held that the evidence clearly showed that Coleman was not the procuring cause of the sale.

Most of the other cases cited by the defendants are cases where the original broker had abandoned efforts to sell the property and another broker sold the property. Here there was no abandonment on the part of the plaintiff, and she was continuing her efforts with the ultimate purchasers up to four days prior to the sale date.

may be considered as a question of fact, based upon the evidence, and as such should have been admitted to a jury.

The law of the cases cited by the defendant is not applicable to the instant case for several reasons. In the case of Reynolds v. Old Line Life Ins. Co., 320 Ill. App. 133, there was no contract of employment between the seller and the broker. The case of Thomas v. Morris, 314 Ill. App. 573, cited by the defendant is an abstract

opinion. However, a reading of the full opinion shows that the court in that case, sustained a finding by the master as to the allowance of a commission to two brokers, Morris and Thomas, who worked jointly

to sell the property. The court in that case held that Morris and Thomas were the procuring cause of the sale and that they were entitled to a commission. The court in the case of Chicago Title & Trust Co. v. Grubb, 323 Ill. App. 606, while holding that an owner may employ one

or more brokers to sell real estate, also held that the broker who is the efficient cause of the sale is entitled to the commission. In the case of Colman v. State, 320 Ill. App. 136, the court held that the evidence clearly showed that Colman was not the procuring cause of the

sale. Most of the other cases cited by the defendant are cases where

the original broker had abandoned efforts to sell the property and another broker sold the property. Where there was no abandonment on the part of the plaintiff, and she was continuing her efforts until the ultimate purchasers up to four days prior to the sale date.

We must therefore hold that the plaintiff here made out a prima facie case and that the granting of the motion of defendants for a directed verdict in favor of the defendants was error. A question of fact was presented that should have been submitted to a jury.

The judgment of the Circuit Court is reversed and the cause remanded with directions to overrule defendant's motion.

Reversed and remanded with directions.

Roeth, P.J. and Carroll, J., concur.

He must therefore hold that the principal facts are not in issue
facts came and that the granting of the writ of habeas corpus for a
direction verified in favor of the defendant was error. A question
of fact was presented that should have been submitted to a jury.
The judgment of the District Court is reversed and the case
remanded with directions to certify defendant's motion.
Reversed and remanded with directions.

Boeth, P.J. and Campbell, J., concur.

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

General No. 10213

Agenda No. 21

Norma Dean Long,

Plaintiff-Appellee,

vs.

Samuel M. McKendree,

Defendant-Appellant.

20 LA^{2d} 147 7Appeal from
Circuit Court
Vermilion County.

REYNOLDS, J.

Plaintiff sued the defendant for clerical services in a justice of the peace court. Judgment was rendered for the plaintiff in the amount of \$31.30. Defendant in apt time filed with the justice an appeal bond, appealing the cause to the Circuit Court of Vermilion County. The appeal bond, which was approved by the justice, was signed by the appellant, but was not signed by any surety. The plaintiff filed motion in the Circuit Court to dismiss the appeal for want of a sufficient appeal bond. Defendant then made motion for leave to file a surety bond, which was allowed by the Circuit Court. Defendant failed to file an amended bond and plaintiff thereupon filed her second motion to dismiss for want of sufficient

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appeal bond, and upon defendant's announcement that he did not desire to file an amended or corrected appeal bond, the second motion to dismiss was allowed. Defendant has appealed to this court.

Defendant's theory of the case is that the officer approving such an appeal bond is allowed a measure of discretion as to the setting and the approval of the bond. That a bond without a surety if approved by the approving officer as to security is valid; and that once a bond for appeal is approved by the approving officer, the reviewing court has no authority to disturb it. The plaintiff's position is the requirement of a surety is mandatory.

Appeal from a justice of peace court is purely statutory. Section 116, Chapter 79, Illinois Revised Statutes provides for the method of appeal. Appeal may be made to either the County or the Circuit Court, and the method of proceeding to appeal may be one of two ways. One provides the appealing party may pay the fee required and file an appeal bond with the justice to be approved by the justice. The other method is to pay the fee required and file appeal bond with the clerk of the court to which the appeal is taken. The only questions here are whether or not a surety is necessary on the appeal bond, and whether the approval of the bond by the justice of the peace makes it a good bond even though there is no surety or security.

appeal bond, and upon defendant's announcement that it is intended to
to file an amended or corrected appeal bond, the second motion to
dismiss was allowed. Defendant has appealed to this court.
Defendant's theory of the case is that the officer approved and
an appeal bond is allowed a measure of discretion as to the validity
and the approval of the bond. That a bond without a stamp is approved
by the approving officer as to security is valid; and that such a bond
for appeal is approved by the approving officer, the reviewing court
has no authority to disturb it. The district's position is that
requirement of a surety is mandatory.
Appeal from a justice of peace court is a civil action.
Section 110, Chapter 73, Illinois Revised Statutes provides for the
method of appeal. Appeal may be made to either the County or the
Circuit Court, and the method of proceeding to appeal may be one
of two ways. One provides the appealing party will pay the re-
quired fee and file an appeal bond with the justice to be approved by the
justice. The other method is to pay the fee required and file appeal
bond with the clerk of the court to which the appeal is taken. The
only questions here are whether or not a surety is necessary for the
appeal bond, and whether the approval of the bond by the justice of
the peace makes it a good bond even though there is no surety or
security.

Section 116 of Chapter 79, Illinois Revised Statutes, in providing for appeals from a justice of the peace court, says:-

"The party praying for an appeal shall, within twenty days from the rendition of the judgment, pay the fee provided by law for the filing of such appeal and enter into bond with security to be approved and conditioned as hereinafter provided, in substance as follows:". Then follows a suggested form of bond, which said suggested form provides for a surety in addition to the principal praying the appeal. Following the suggested form the section provides for the approval of the appeal bond by either the justice of the peace or the clerk of the court to which the appeal is taken.

Defendant urges that under Section 116 of the Justices and Constables Act, a measure of discretion is permitted an approving officer by the setting of bond and approval of same.

There can be no question that as a general statement, this is true. The approving officer sets the amount of the bond in many cases, and even in appeals such as this, must see that the bond is twice the amount of the judgment and costs. The approving officer likewise has discretion as to the sureties on the bond, as to whether they are good and responsible bondsmen. But this court seriously questions the right of the justice of the peace or the clerk of the court the appeal is taken to, to waive the surety on the bond, which

Section 115 of Chapter 27, Illinois Revised Statutes, in providing for deposits first a justice of the peace shall, upon application of the party, issue an order of commitment, which shall be filed with the clerk of the court, and the fee provided by law for the filing of such order shall be paid with the order. In the event of non-compliance with the order, the justice of the peace shall be liable for the same. Then follows a suggestion that the order, which is suggested to be a writ in addition to the original writ, should be a writ of habeas corpus from the justice of the peace to the court of appeals, following the suggestion from the justice of the peace or approval of the appeal shall be either the justice of the peace or the clerk of the court to which the appeal is taken.

Defendant argues that under Section 115 of the Statutes and Constitution, a writ of habeas corpus is entitled to be granted by the justice of the peace and approval of same.

There can be no question that as a general statement, this is true. The reviewing officer calls the record of the case in issue into question, and even in cases such as this, and says that the law is twice the amount of the judgment and order. The reviewing officer likewise has discretion as to the review of the bond, as to whether they are good and reasonable. But this court certainly questions the right of the justice of the peace or the clerk of the court the appeal is taken to, to waive the surety on the bond, which

by the plain language of the statute is required. It might well be that the word "security" as used in the statute could mean a cash "security", but there can be no question that the Legislature contemplated either security in the form of money or chattel property, or security by some responsible person other than the appealing party, signing as surety.

The defendant cites the case of Bennett v. Pierson, 82 Ill. 424, but that case fails to sustain his position. In that case the Circuit Court, on an appeal from a justice of the peace, required the party appealing to file an additional appeal bond, and upon failure of the appealing party, dismissed the appeal. The case held that the Circuit Court had such power to dismiss upon the failure to file the additional bond. Defendant cites the case of Smith v. Ammen, 101 Ill. App. 144, but again this case fails to support the defendant's contention. The point in the Smith v. Ammen case was whether the appealing party can bring suit in equity, where he has filed a proper bond, but the justice of the peace refuses to send the transcript of the judgment to the County Court because he claimed the costs had not been paid.

In the case of Antrim v. Guyer & Calkins Co., 324 Ill. App. 641, the precise point at issue here is passed upon, namely, where the appealing party signs the appeal bond without any surety, does that render the bond so defective that the appeal shall be dismissed? In that case, only the appellant signed the bond, filed it with the justice

by the plain language of the statute is required. It might well be
 that the word "remedy" as used in the statute could mean a writ
 "recovery", but there can be no question that the Legislature con-
 sidered either remedy in the form of writ or judicial remedy,
 or remedy by some responsible person other than the opposing party,
 standing as surety.

The defendant gives the case of Smith v. Smith, 22 Ill. 2d,
 but that case fails to sustain his position. It was not the Circuit
 Court, on an appeal from a Justice of the Peace, required the party
 appealing to file an additional appeal bond, and was affirmed by the
 appellate party, dismissed the appeal. The case held that the Circuit
 Court had such power to dismiss upon the failure to file the additional
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 County Court because he claimed the case had not been paid.

In the case of Smith v. Smith, 101 Ill. App. 2d,
 the Justice of the Peace was required to pass upon, usually, where the
 appealing party alone the appeal bond without any surety, does that
 render the bond so defective that the appeal shall be dismissed. In
 that case, only the appellant signed the bond, filed it with the Justice

of the peace, and the justice of the peace verbally approved the bond by stating he would take the appellant as security, wrote "Appealed" on his docket the same day, and personally delivered the bond and transcript to the deputy circuit clerk and the deputy circuit clerk stamped them "Filed". In circuit court the appellee moved to dismiss the appeal on the ground that the appeal bond did not appear to have been filed, either with the clerk of the court or with the justice of the peace; that there was no surety on the bond, and that the statute requires that the bond be taken and approved, either before the justice of the peace or before the clerk of the court, and that it have at least one surety. The appellant filed a motion to file an amended appeal bond or a new appeal bond, and this was denied by the circuit court, and on renewal of the motion to dismiss, the appeal was dismissed. The Appellate Court reversed and remanded the case, and held that Section 69 of the Justices and Constables Act of 1872, adopted from the Act of 1853, as amended by the Justices and Constables Act of 1895, was still in full force and effect. That section, was in the following language: "No appeal from a justice of the peace shall be dismissed for any informality in the appeal bond. But it shall be the duty of the court before whom the appeal may be pending, to allow the party to amend ^{the} same within a reasonable time, so that a trial may be had on the merits of the case." And the court in the same case, in passing on the question of the approval of the bond held as follows: "The approval of an appeal bond by a justice of the peace perfects an appeal although the bond is

of the peace, and the justice of the peace was by a review of the
by stating he would take the appeal as a matter of course, and the
on his death the same day, and the appeal was delivered to the
transcript to the deputy clerk of the court, and the clerk of the
stated that "it is a matter of course that the appeal was to be
the appeal on the ground that the appeal was not to be
been filed, either on the ground of the court or on the ground of
the peace; that there was no appeal on the bond, and that the appeal
required that the bond be taken and approved, either before the justice
of the peace or before the clerk of the court, and that it was not
one surety. The appeal was filed a motion to file an amended appeal bond
or a new appeal bond, and this was granted by the circuit court, and on
renewal of the motion to dismiss, the appeal was dismissed. The
Court reversed and remanded the case, and held that section of the
Justice and Constables Act of 1873, adopted from the Act of 1863, as
amended by the Justice and Constables Act of 1881, and still in full
force and effect. That section, was in the following language: "No
appeal from a justice of the peace shall be admitted for any reason
in the appeal bond. But it shall be the duty of the court to receive
the appeal bond, and to allow the party to amend the appeal bond
reasonably, so that a trial may be had on the merits of the case."
and the court in the same case, in passing on the question of the
approval of the bond said as follows: "The approval of an appeal bond
by a justice of the peace perfects an appeal although the bond is

defective. (Miller v. Superior Mach. Co., 79 Ill. 450.) It has also been held that it is not necessary that a formal approval of the bond be written thereon, but accepting the bond, expressing satisfaction with the security, and acting upon it, amounts to an approval."

Following the line of reasoning in the Antrim v. Guyer & Calkins case, supra, the failure of the Appellant to provide security, either by way of money, chattels or surety, rendered the bond a defective or imperfect appeal bond. The approval of the bond by the justice of the peace, perfects the appeal to the point that the case is moved into the higher court, but it is still a defective bond in the light of the language of Section 116, Chapter 79 Illinois Revised Statutes, but it can be amended, and if attacked by the appellee the appellant has the right to amend or furnish a new bond. Leave was granted in this case for the appellant to amend but the appellant failed to do so. If the appellant had amended or furnished a new and proper bond, there can be no question, under the language of Section 69 of the Act of 1872, which is still in full force and effect, that a trial on the merits could have been had in the Circuit Court. Failing to file an amended or new bond, the bond being defective, the Circuit Court could only dismiss the appeal.

Affirmed.

Roeth, P.J. and Carroll, J., concur.

selective. (Miller v. Superior Mach. Co., 75 Ill. 480.) It was
also held that it is not necessary that a formal approval of
the bond be written thereon, but according to the bond, expressing
satisfaction with the security, and acting upon it, amounts to an

approval.

Following the line of reasoning in the Miller v. Superior Mach. Co. case, and the failure of the appellant to provide security, either
by way of money, chattels or bonds, rendered the bond a defective
instrument. The approval of the bond by the trustee in
the process, reflects the approval of the fact that the value of money
from the highest court, was to be still a defective bond in the light
of the language of Section 114, Chapter 7, Illinois Revised Statutes,
now in force, and it is stated by the appellee the appellant
was the trustee in whom or towards a new bond. There was granted to
this case for the appellee to show that the appellant failed to do so.
If the appellant had money or chattels or a new and proper bond, there
can be no question, under the language of Section 114 of the Act of
1872, which is still in full force and effect, that a trial on the
facts could have been had in the Circuit Court. Failure to file the
bond or new bond, and the failure to file the bond, the Circuit Court
could only decide the appeal.

Reversed.

Reith, P.J. and Carroll, J., concur.

487
47462

FRANCES PRITCHETT,

Plaintiff-Appellee,

v.

INDIANA HARBOR BELT RAILROAD CO.,
and BALTIMORE & OHIO CHICAGO
TERMINAL RAILROAD CO., corporations,

Defendants-Appellants.

A
APPEAL FROM

CIRCUIT COURT

COOK COUNTY

20 I.A.²¹ 190

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Frances Pritchett sued to recover for injuries sustained in a grade crossing collision between her automobile and a train of the Indian Harbor Belt Railroad Co., operating on the tracks of the Baltimore & Ohio Chicago Terminal Railroad Co., hereinafter for convenience called respectively, "IHB" and "B&OCT." The court entered judgment on a verdict for \$150,000 and the defendants appeal.

Plaintiff, 34 years of age, was injured on December 13, 1956, when at 6:05 A.M., she drove her automobile onto a grade crossing in front of the freight train of IHB while it was operating over the tracks of the B&OCT. She approached the B&OCT crossing from the south on a two-lane highway known as Ridgeland Avenue, located in Chicago Ridge. The tracks of the B&OCT intersect Ridgeland Avenue at an angle from the northwest to the southeast. South of the B&OCT crossing the tracks of the Wabash Railroad cross Ridgeland Avenue from the southwest to the northeast and intersect with the B&OCT tracks at approximately 200 yards east of Ridgeland Avenue. The view of the plaintiff of the approaching train was unobstructed for 1,000 feet as she approached

-2-

the tracks except for one house located 450 feet south of the nearest rail, and completely unobstructed for the last 450 feet.

Plaintiff's evidence was that the crossing gates at the intersection were not in operation. Plaintiff's witness, Bachar, testified that he viewed the mishap from approximately 1,000 feet north of the scene, and that the railroad crossing gates came down after the IHB train had stopped on the Wabash tracks east of Ridgeland Avenue. The evidence of three of defendants' witnesses was that the flashing lights on the gates began working when the train was 2,000 feet west of the crossing and at the same instant the gates started down. Three witnesses testified that the gates were completely down and the lights flashing when the locomotive was 1,000 feet west of the crossing. Robert Schroeder, the locomotive engineer, testified that plaintiff drove around the lowered crossing gates and was struck by the approaching engine at approximately the center line of Ridgeland Avenue and the most southerly track at the crossing. Plaintiff was driving in her automobile on a well-traveled road which she had used daily for 14 months. She was familiar through daily travel with the route and with the safety devices of the railroad at Ridgeland Avenue and the B&OCT tracks. The crossing is about a block and a half from her home. Night conditions prevailed. There had been a very light snow, according to plaintiff; one witness for defendants described it as a heavy white frost; another described the pavement as having slushy snow. Others testified to well-defined lanes in the snow. The official United States weather report showed that temperatures for the day ranged from 13 to 30 degrees above zero,

with an average of 22 degrees. Plaintiff testified that the heater and defroster on her car were operating and that she could see clearly through all the windows. She observed that the gates were up and that no warning lights were operating. Her automobile was knocked a distance of 12 feet north and 40 feet east by the front of the locomotive, which was hauling a seventy-car train 3,500 feet long.

Plaintiff testified that she did not look to the left or right for approaching trains as she was approximately 50 to 75 feet from the crossing, and that she did not look for approaching trains coming from the left or right at any time as she approached the crossing. She could see 35 to 40 feet to the west when her automobile was 75 feet from the most southerly rail, and she could see 20 feet to the west as her automobile was on top of the rails. At the intersection of the B&OCT and Wabash tracks a signal tower is maintained and operated by the Wabash Railroad. Plaintiff's witness, Greene, testified that the operation of Lever No. 4 controls the distant and home signals on the B&OCT tracks upon which the IHB train was operating. At a point 2,000 feet west of Ridgeland Avenue the gates will be activated by a train approaching Ridgeland Avenue if the home signal is set green by Lever No. 4. When witness Greene received notice of the approaching train, he set Lever No. 4 in the "out" position, which set up a green signal for the approaching train.

Witness Gene Schroeder, for the plaintiff, testified that the crossing gates are owned and maintained by the B&OCT and that the approaching IHB train would activate the gates 2,000 feet west of Ridgeland Avenue. The lights on the crossing gates will flash

from three to five seconds and the gates will drop to a completely horizontal position in approximately five seconds, for a total elapsed time from activation to complete lowering of eight to nine seconds. His inspection of the crossing gates, signals and flashing lights immediately after the occurrence disclosed all of the equipment to be in proper working order. The home signal, located approximately 40 feet to the west of Ridgeland Avenue was set for green by the tower operator, and all of the witnesses having occasion to view the signal testified that it displayed a green light indicating that the IHB train might proceed. The distant signal located 6,500 feet west of Ridgeland Avenue, which indicates the color of the signal on the home signal, indicated a green light as the IHB train approached the Ridgeland Avenue crossing. A previous train had passed through the B&OCT-Wabash intersection at 6:01 A.M. and the position of Lever No. 4, even if it had not been reset, would have caused the gates to lower when the IHB train was 2,000 feet from Ridgeland Avenue. The bell on the IHB locomotive began operating at the roundhouse at Melrose Park about an hour and a half prior to the occurrence and remained in operation until after the collision. The IHB locomotive headlight was in operation since leaving the roundhouse, and the condition of the headlight did not change up to and including the time of the occurrence. The locomotive engineer on the IHB train began sounding the whistle before the engine reached the viaduct west of the crossing and the standard and usual crossing signal was being sounded up to and immediately prior to the collision.

One of the three police officers investigating the collision found tire tracks in the snow leading around the lowered gates on the south side of the crossing, the direction from which plaintiff approached, and these tracks terminated at the center line of Ridgeland Avenue in a pile of debris and dirt where the IHB train was standing. The police officer could not see through the windows of plaintiff's automobile, due to their frosted condition. Witness Didier observed the frosted condition of the windows as well as the tire tracks leading around the lowered gate on the south side of the crossing. The tire tracks did not continue on the north side of the standing IHB train. Witness Robert Schroeder found the automobile tracks leading around the lowered gate on the south side of the crossing, and found that they ended at the north rail of the track upon which his train was standing. Because he saw the automobile of the plaintiff go around the lowered gate, he was positive that the tracks he saw belonged to the plaintiff. The IHB train approached the crossing at a speed of 30 to 35 miles an hour. Plaintiff's automobile was traveling at a speed of 15 to 20 miles an hour. There was testimony that in response to questions as to what happened, plaintiff said: "I was late for work and I went around the gates." She was taken to a hospital in an ambulance and remained there for approximately a month.

Defendants maintain that because plaintiff was guilty of contributory negligence as a matter of law, judgment should be entered for the defendants. They say that the view of plaintiff of the approaching train and her disregard of the locomotive signals

require a finding of her negligence as a matter of law, and that the evidence of plaintiff concerning the operation of the crossing gates does not excuse her conduct in failing to look for approaching trains. Defendants further insist that there is no credible evidence to support a finding that they were guilty of negligence. We have not found any Illinois case which holds a plaintiff guilty of contributory negligence as a matter of law where flasher lights and gates have failed to operate and nighttime conditions prevailed. The rule in Illinois is that when a railroad has erected and maintained crossing gates, the failure to lower the gates amounts to an invitation to travelers on the highway and assurance that they can cross over the railroad tracks in safety. Humbert v. Lowden, 385 Ill. 437. There is evidence to support plaintiff's allegations of negligence and that she was in the exercise of due care. Viewing the testimony in the light most favorable to the plaintiff, we cannot sustain defendant's contention that they should have a judgment notwithstanding the verdict.

The defendants assert that the court committed reversible error in giving plaintiff's instruction No. 15. It purports to be a statement of the issues to be determined by the jury, but is in fact a reproduction of the amended complaint, is peremptory in form and directs a verdict for the plaintiff. The words "carelessly," "negligently," "violent," "dangerous" and "defective" appear numerous times in the instruction. An allegation of negligently causing a collision with the automobile of plaintiff is stated five different ways, each replete with the words "carelessly

and negligently." Not only is the instruction unduly prolix, covering three pages of the abstract, but it sets out the charges of negligence in the amended complaint in haec verba and the frequent repetition of the allegations endowed them with unilateral significance. The instruction ignored the suggestions given in Signa v. Alluri, 351 Ill. App. 11. See also Pappas v. Peoples Gas Light & Coke Co., 350 Ill. App. 541. The allegations concerning the operation of the train at a dangerous rate of speed and "negligently failing to keep a lookout" were submitted to the jury. There was no evidence to support either of these allegations. While there was evidence as to the speed of the train, there was no evidence that the train was going at a dangerous speed. In Schlauder v. Chicago and Southern Traction Co., 253 Ill. 154, the court said (162):

"It is contended that there was no evidence tending to sustain the allegations of the second or third additional counts, and therefore the instructions were erroneous. It has always been the rule that it is error to give an instruction telling the jury that if a certain fact exists a certain rule of law applies or a certain verdict is to be returned, if there is no evidence of the fact. Such instructions must be based upon evidence in the case, and a statement of a hypothesis of fact virtually tells the jury that there is evidence from which they may believe in the existence of the fact, and if there is no evidence the instruction is misleading."

The pleadings charge the IHB with negligence in the operation of the train and charge the B&OCT with negligence in connection with the condition of the crossing. The concluding paragraph of the instruction states that if "the defendants or any of them were guilty of one or more of the particular acts of negligence as above set forth," then the jury should find "said defendants guilty." Defendants say that it is obvious that under

this direction the jury could find the IHB guilty of one of the three charges of IHB negligence and the B&OCT not guilty as to any specific act of negligence, but under the instruction the jury must return a verdict against both defendants. One of the charges of negligence against the IHB was that it "carelessly and negligently failed to keep a proper and sufficient lookout." Under the rule announced in the concluding paragraph of the instruction the jury ^{could} find the IHB guilty of that particular act, and regardless of the conduct of the B&OCT a verdict would have to be returned against both defendants. Plaintiff answers that the instruction correctly states the applicable law, citing Armstrong v. C. & W. I. R. R. Co., 350 Ill. 426. In the Armstrong case the court said (431-2):

"The principle is thoroughly established that where an injury results from the negligent or unlawful operation of a railroad, whether by the owner or by another whom the owner authorizes or permits to use its tracks, both railroad companies are liable to respond in damages to the party injured. [Citing cases.] The lessor and lessee are not only jointly and severally liable to the general public but the rule embraces employees of the lessee, * * * and although the relation of lessor and lessee is not shown to exist, the rule applies to cases where the owner permits another railroad to use its tracks."

The defendants say that the Armstrong case has no application to the facts of the instant case and that the theory advanced by the plaintiff deals with the liability of an owner railroad to the employees of a user railroad. It will be noted that the Armstrong opinion states that the lessor and the lessee are jointly and severally liable to the general public.

Much of the evidence of the plaintiff was devoted to an attempt to prove negligence on the part of the Wabash Railroad



through the operation of a signal tower by it. A verdict for the Wabash Railroad was directed at the close of all the evidence. Plaintiff attempted to prove that the Wabash Railroad tower controlled the operation of the crossing gates and that the tower operator could have lowered the gates within the time limit of two seconds if he had watched the approaching train. The complaint charges each defendant with specific acts of negligence. The instruction likewise alleged certain specific acts of negligence against each of the defendants separately. A reading of other instructions given at the instance of plaintiff indicates that the theory of plaintiff during the trial was that each defendant owed a separate and distinct duty to her. While the instruction is supported by the principle announced in the Armstrong case, the way in which this proposition of law was presented was likely to confuse the jury. Defendants criticize the instruction on the further ground that it ignores an affirmative defense set up by them and gives incomplete and improper treatment to their answer. Defendants are in error when they say that the part of their answer pleading that plaintiff's own negligence and lack of due care proximately caused or proximately contributed to cause the occurrence constitutes an affirmative defense. The proof of due care by the plaintiff is one of the essential elements of her case. We agree that the instruction failed to give adequate treatment to defendants' answer. The giving of instruction No. 15 was erroneous and requires a reversal and remandment of the cause for a new trial.

The defendants complain that the court erred in refusing to give an instruction that any "admissions that may have been proved to have been made by the plaintiff are proper for the jury to consider in forming their verdict, and the jury will give any admissions, if any thus proved, such weight as they think them entitled to." This instruction was approved in an opinion by Justice Breese in Howard v. Babcock, 21 Ill. 259-263. There was testimony that on at least two occasions plaintiff made admissions either by way of deposition or unsworn statements. The testimony of plaintiff on pre-trial deposition was contradicted by her at the trial on the question of whether she looked for approaching trains. The testimony of the police officers concerning plaintiff's admission that she drove around the lowered gate was important. We conclude that the tendered instruction should have been given. It is unnecessary to extend this opinion by discussing the other points urged by the defendants.

The judgment is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

FRIEND, P. J., and BRYANT, J., CONCUR.

ABSTRACT ONLY.



STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

20 I.A.²³ 191¹

General No. 10191

Agenda 7

The National Bank of Mattoon, Administrator
of the Estate of Margaret E. Tingley,
deceased.

Plaintiff-Appellant,

vε.

Appeal from
Circuit Court
Coles County

Paul Hanley,

Defendant-Appellee.

Roeth, P.J.

Plaintiff, as Administrator of the Estate of Margaret Tingley, deceased, brought an action for the wrongful death of Margaret Tingley, who was killed in an automobile collision while riding as a guest in defendant's automobile. At the close of plaintiff's case, the trial court directed the jury to return a verdict of not guilty for the defendant. Subsequently a post trial motion for new trial was filed by plaintiff. This motion was denied and judgment was entered on the jury's verdict. It is from this judgment that plaintiff appeals.

It is conceded by counsel for both parties that the primary question involved in this appeal is whether there is any competent evidence, standing alone, together with any reasonable inferences to be drawn therefrom, taken with all its intendments most favorable to the plaintiff, to prima facie support (a) the charge of wilful and wanton misconduct on the part of defendant, and (b)

freedom from wilful and wanton misconduct on the part of plaintiff's intestate.

The complaint charged that defendant wilfully and wantonly and with a conscious indifference to consequences (1) operated his motor vehicle (2) failed to keep a proper lookout ahead (3) operated his motor vehicle at a high and dangerous speed so as to lose control thereof (4) operated said motor vehicle after consuming intoxicating beverages (5) drove his motor vehicle off the highway into a post causing it to overturn. The answer of defendant admitted that defendant was operating the motor vehicle and denied plaintiff's intestate was a guest; denied the charges of wilful and wanton misconduct and denied that plaintiff's intestate was free from wilful and wanton misconduct. The appointment of the administrator, the death of Margaret Tingley as a result of the occurrence and the life expectancy of Margaret Tingley were stipulated.

Viewing the testimony in its light most favorable to plaintiff, it appears from the record that the occurrence in question happened on March 3, 1957, at about midnight. At that time the defendant was operating his automobile in a northerly direction on U. S. Route 45 about six miles north of Effingham. U. S. Route 45 is a two lane black top highway 23 feet 10 inches wide and at the point of the occurrence the road was straight and substantially level. The weather was cold, clear and without rain or snow and the night was dark. Three or four miles south of where the occurrence took

place, the automobile being driven by the defendant passed an automobile being driven by Leonard Long, who testified for plaintiff. Leonard Long was driving at a speed of 60 miles per hour and he testified that defendant's automobile as it passed him was travelling at 80 to 85 miles per hour. As defendant's car passed him he observed a man driving and a lady sitting on the front seat close beside the man driving. Both automobiles had their headlights on and Long could observe the tail lights on defendant's automobile for about a minute as it pulled away after passing since the highway was level. The witness Long next saw the defendant's automobile in a field to the east of U. S. Route 45 as he, Long, was driving on U. S. Route 45. The headlights on defendant's automobile were shining out across the field and dust and smoke were rising around it. He stopped his car and went over to investigate. The defendant's automobile was facing east and on its left side. As he came up to the automobile, the defendant was getting out. He asked defendant where the girl was and defendant asked him the same question. She was found about 75 feet beyond where the automobile was, in an unconscious condition. Long testified that defendant kept saying, "Oh Lord what have I done? I've killed her". Long then drove into Sigel, washed up and returned to the scene just as the State Highway Policeman drove up. In the interim the automobile had not been moved. No other automobile passed Long prior to the occurrence nor did he meet any oncoming automobile.

Glenn Kibler, the State Highway Policeman, testified for plaintiff. At the time he arrived at the scene of the occurrence

place, the automobile being driven by the defendant, was an
automobile being driven by Leonard Lane, who testified for the
Lane was driving at a speed of 40 miles per hour and the
testified that defendant's automobile as it passed him was traveling
at 30 to 35 miles per hour. As defendant's car passed him he
observed a car driving east on the north side of the road
beside the main highway. Both automobiles were traveling on
and Lane could observe the tail lights of defendant's automobile
for about a minute as it pulled away after passing him. He
was Level. The witness Lane next saw the defendant's automobile
in a field to the east of U. S. Road No. 1, Lane is a car, was driving
on U. S. Road No. 1. The position of defendant's automobile was
this and across the field and that and some were riding around
it. The witness Lane saw the car next seen to be defendant. The defendant's
automobile was facing east and on the left side. As he came up
to the automobile, the defendant was facing east. He also testified
while the car was moving toward him the car was facing
was found about 75 feet behind where the automobile was, it is
unsubstantiated evidence. Lane testified that defendant's car was
the car was facing east. Lane testified that the car was facing
into the field, turned up and returned to the house just as the witness
highway. Following Lane's testimony the automobile had not
been seen. The automobile passed Lane prior to the occurrence
could be seen and becoming defendant's.

John Kiefer, the State Highway Engineer, testified for
that at the time he arrived at the scene of the occurrence

the injured had been removed and his examination was confined to an examination of the scene and the making of certain measurements. He found the defendant's automobile in the field and about 25 feet east of the highway, on its left side and with the front end badly damaged. He examined the ground at the scene of the occurrence and found it to be frozen, with tracks made by an automobile leading off the highway in a northerly direction. At the point where the tracks commenced there was only one track and then later two tracks. From the point where the single track was first noticed off the highway, they proceeded a distance of 153 feet to a point where a 6 inch by 6 inch post had been inserted in the ground as a low culvert marker. The post was uprooted and was lying 15 feet from its original position. The tracks then continued down a drainage ditch which was $1\frac{1}{2}$ feet deep, gouging out the ditch to the point where the car came to rest in the field. The total distance of these tracks from the time the automobile left the highway until it came to rest was 402 feet.

The witness Kibler also testified that at the point where the tracks off the highway first commenced, there was no drop off between the edge of the black top and the edge of the shoulder. The shoulder was 7 feet wide with a slight incline toward the ditch. There was some water in the ditch. The foregoing is the substance of the testimony with reference to the occurrence. No question of loss to next of kin, a husband and son, is raised.

From the foregoing we are of the opinion that the record was sufficient as against a motion for directed verdict, to establish

the injuries had been reviewed and the examination was confined to an examination of the scene and the making of certain measurements. He found the defendant's automobile in the field and about 25 feet east of the driveway, on the left side and with the front end badly damaged. He examined the ground at the scene of the occurrence and found it to be frozen, with tracks made by an automobile leading off the driveway in a northerly direction. At the point where the tracks commenced there was only one track and then later the tracks. From the point where the tracks began they continued off the driveway, they proceeded a distance of 115 feet to a point where a 6 inch by 4 inch post had been inserted in the ground at a four foot width. The post was supposed to be 1 foot 10 inches from the original position. The tracks then continued from a distance of 115 feet to 1 foot 10 inches, crossing out the field to the point where the car came to rest in the field. The tracks of the automobile from the time the automobile left the driveway until it came to rest was 400 feet.

The witness further also testified that at the point where the tracks off the highway began, there was no sign of the defendant's automobile. The witness also testified that the tracks of the automobile were 9 feet wide with a slight incline towards the right. There was some water in the ditch. The defendant's automobile was of the standard type with a bumper and was, in witness's opinion, a 1934 model.

From the foregoing we are of the opinion that the record was sufficient as against a motion for directed verdict, to establish

the fact that defendant was driving the automobile and that plaintiff's intestate was riding therein as a guest at the time of the occurrence. Likewise we are of the opinion that the question of freedom from wilful and wanton misconduct on the part of plaintiff's intestate was a question of fact for the jury. In Anderson vs. Launer, 13 Ill. App. 2d 530, 142 N.E. 2d 838, a guest case, we followed Robinson vs. Workman, 9 Ill. 2d 420, 137 N.E. 2d 804, and there said:

"Every presumption will be indulged in, in favor of the human instinct of self preservation and avoidance of danger. Robinson vs. Workman, supra, and cases therein cited. This presumption, standing alone, prohibits this court from holding that there is no evidence showing plaintiff's intestate to be free from wilfull and wanton misconduct. Attention is also called to Myers vs. Krajefska, 8 Ill. 2d 322, a case in which positive, affirmative evidence as to what decedent did or did not do at the time of the actual occurrence and immediately prior thereto, was lacking."

Counsel for defendant cites Valentine vs. England, 6 Ill. App. 2d 275, 127 N.E. 2d 473, and Pritchett vs. Rich, 14 Ill. App. 2d 215, 144 N.E. 2d 173, and Willgeroth vs. Maddox, 281 Ill. App. 480, as announcing a different rule, the theory being that the same set of facts cannot on one hand simultaneously show wilful and wanton misconduct on the part of a defendant and at the same time absolve plaintiff of the same fault. These cases are not applicable to the case at bar.

In the Pritchett vs. Rich case, supra, both plaintiff and defendant were alive. It was expressly noted that the evidence showed that the host and guest were talking, the car was being

driven in its proper lane and at a speed and in a manner acceptable to the guest. The court said that under such circumstances if the driver was guilty of misconduct the guest was by the same token guilty of such conduct as would bar recovery.

In *Willgeroth vs. Maddox* and *Valentine vs. England*, supra, the factual situations were substantially similar. In each case the deceased was riding in a car which was struck by a train. In the *Willgeroth vs. Maddox* case, supra, an eyewitness testified that as the car approached the tracks both the driver and guest were looking straight ahead, that they then both looked to the west but did not look in the direction from which the train was approaching and that neither gave any indication of being aware of the approach of the train. In the *Valentine vs. England* case, supra, bells were ringing, lights were flashing, a horn was blowing and cars were stopped, notwithstanding which the driver drove upon the tracks. In both of these cases the driver and his guest were confronted by the same conditions with equal opportunity of discovering the approach of the train. A more recent case of the same type factually, is *Zank vs. Chicago, Rock Island and Pacific Railroad Co.*, 19 Ill. App. 2d 279, 153 N.E. 2d 482. We do not feel that any of the cases are in conflict with the rule announced in *Robinson vs. Workman* and *Anderson vs. Launer*, supra. If there be any conflict we prefer to follow the last two cited cases. Here we have a death case with no competent eye witness. Thus the presumption comes into play and the law says the deceased

driven in the proper lane of travel and in a manner so as to avoid collision with the truck. The court held that the driver was negligent in that he failed to maintain the proper lane of travel and in that he failed to maintain a proper distance from the truck. The court also held that the driver was negligent in that he failed to maintain a proper speed. The court found that the driver was negligent in that he failed to maintain a proper lane of travel, a proper distance from the truck, and a proper speed. The court also found that the driver was negligent in that he failed to maintain a proper lane of travel, a proper distance from the truck, and a proper speed. The court found that the driver was negligent in that he failed to maintain a proper lane of travel, a proper distance from the truck, and a proper speed. The court also found that the driver was negligent in that he failed to maintain a proper lane of travel, a proper distance from the truck, and a proper speed.

is to be regarded as having done everything necessary to prevent the loss of her life.

We next come to a consideration of whether the testimony as to defendant's conduct was sufficient prima facie to show wilful and wanton misconduct. At the outset it is observed that defendant was driving his automobile at from 80 to 85 miles per hour on a 24 foot black top highway on a dark night. It is a reasonable inference that at this speed, considering the conditions existing, the line of demarcation between the highway and the shoulder would be difficult to observe. Under such circumstances care would require a speed that would make this fact readily discernible. The distance in which an automobile can be stopped while travelling at 80 to 85 miles an hour, under the most favorable circumstances, is the subject of calculation. The distance increases as conditions become less favorable. Thus it is a reasonable inference that the defendant knew or is chargeable with knowledge that his automobile, travelling at this speed, could not be stopped within the distance of 153 feet, being the distance from where his car first left the black top and the point of location of the 6 inch post. Defendant's car passed the Long car approximately two miles from the scene of the occurrence. It pulled away from the Long car after it passed and Long could see it as it pulled away for approximately one minute, when he lost sight of it. This is some evidence of the fact that defendant continued to maintain a speed of from 80 to 85 miles per hour. In addition

there is evidence that the tracks of the defendant's automobile continued in a straight diagonal direction after it left the pavement and came to rest on its side. A reasonable inference to be drawn is that no attempt was made to stop the car or bring it back to the pavement. Of compelling significance are the repeated statements of defendant, "Lord, what have I done? I've killed her". A legitimate and reasonable inference from this statement is that the death of plaintiff's intestate was attributable to the manner in which defendant was operating the car. Coming so soon after the occurrence the statements indicate also a consciousness on the part of defendant that his actions resulted in the death of plaintiff's intestate. Likewise it may reasonably be said that these statements negative mechanical defect as the cause, insofar as they attribute defendant's operation as the cause. The foregoing facts and inferences must be viewed together without isolating one from the other in determining the question before us. Although plaintiff's case was largely circumstantial, it was the highest degree of proof that was available under these conditions and unless liability is to be denied in all such instances, it must be accorded the same judicial concern as are other types of evidence. Robinson vs. Workman, supra. What constitutes wilful and wanton conduct depends on the facts in each case and it cannot be categorically stated what conduct is, and what conduct is not, wilful and wanton. Wilful and wanton misconduct may consist of an entire absence of care for life, person

or property of others such as exhibits a conscious indifference to consequences or utter disregard of the consequences. *Anderson vs. Launer*, supra. The facts and inferences in the case at bar as above referred to, respond to all of the foregoing elements. In our opinion, therefore, there was sufficient evidence prima facie to warrant the submission of the question of defendant's wilful and wanton misconduct to the jury. We are therefore of the opinion that the trial court erred in directing the jury to return a not guilty verdict at the close of plaintiff's evidence.

Accordingly the judgment of the Circuit Court of Coles County is reversed and the cause is remanded for a new trial.

Reversed and Remanded.

Carroll, J., and Reynolds, J., concur.

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Central Intelligence Agency, Washington, D.C.

Abstract

A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 10194

Agenda 10

Frank Babiak, Jr.,

Plaintiff-Appellee,

vs.

Nathan Strum and Ida Strum,

Defendants-Appellants.

20 I.A. 23 191 2
Appeal from
Circuit Court
Sangamon County

Roeth, P. J.

This is an appeal from a decree of the Circuit Court of Sangamon County foreclosing a mechanics lien on property owned by defendants. The complaint alleged in substance that defendant Nathan Strum was the owner of real estate in Springfield, Illinois and that defendant Ida Strum was his wife; that Nathan Strum leased the premises to Harvey Gershien, Jack Gershien and Goldie Gershien for restaurant, grocery store and delicatessen purposes. These allegations of the complaint are admitted by defendants' answer. The complaint further alleged that plaintiff entered into an oral contract with the lessees to install a complete electric wiring system, including light fixtures; that thereafter said lessees ordered certain wiring extras; that defendants had knowledge of the contract and the ordering of the extras and knowingly permitted the same; that there remains due and owing plaintiff \$1,330.18. These allegations are denied by the answer.

Abstract

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STATE OF ILLINOIS
Circuit Court
County of Cook

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The answer admits the filing of claim for lien by plaintiff within the time required.

The cause was referred to a Master in Chancery. The Master made a report of evidence and conclusions finding that plaintiff was entitled to a lien. Objections to the Master's report were overruled by the Master and by agreement they stood as exceptions in the Circuit Court. The Circuit Court approved the Master's report, directed the payment of amount then due within 5 days and in default thereof that the property be sold.

Two primary questions are raised and argued on this appeal, (1) whether or not defendants knew of the contract and the ordering of the extras and knowingly permitted the same, and (2) were the items installed lienable items. The first question is largely a question of fact and requires an examination of the evidence.

Plaintiff testified that his initial contract with the lessees was made on July 22, 1955 at the leased premises. This contract was for the installation of a wiring system to use for lights, receptacles, outlets and motors and the installation of three fluorescent fixtures. He testified the work commenced on July 25 and that two of his men did the work and he supervised it and that he was present on the job every day until its completion on August 17. He further testified extras were ordered by the lessees from time to time during the above period and installed. No question is raised as to the work being done or the reasonableness of the charges.

The answer admits the filing of claim for lien by Plaintiff within the time permitted.

The cause was referred to a Master in Chancery. The Master made a report of witness and conclusions finding that Plaintiff was entitled to a lien. Defendant to the Master's report were overruled by the Master and by agreement they stood as exceptions in the Circuit Court. The Circuit Court approved the Master's report, directed the payment of amount due within 30 days and in default thereof that the property be sold.

Two primary questions are raised and argued on this appeal. (1) Whether or not defendant knew of the contract and the character of the work and lawfully permitted the work, and (2) were the

plaintiff's claims enforceable. The first question is largely a question of fact and requires an examination of the evidence.

Plaintiff testified that the initial contract with the defendant was made on July 22, 1927 at the leased premises. The contract was for the installation of a water system in the lot. Plaintiff, defendant, estate and others and the installation of three fire hydrant fixtures. He testified the work commenced on July 24 and that two of the men did the work and he supervised it and that he was present on the job every day until the completion on August 17. He further testified that there were others by the name of first to last during the above period and installed. In question is raised as to the work being done on the premises and of the charges.

According to plaintiff he met the defendant Nathan Strum on July 25 outside the building and that Strum said to him, "Thank me for the job, I recommended you for this job. These people didn't know too much about you and I told them you were a good electrician and they could depend on you. I want you to do me the best job you can put in because if they ever move out I don't want to have to put in additional wiring or have to re-wire." He also testified that Strum was in and out of the building during the work on several occasions, both during installation of the original work and the extras. On one occasion plaintiff says he met Strum on the street and called his attention to the extras, whereupon Strum said not to worry, that the lessees were good for it. On cross examination plaintiff testified that on the occasion of his first conversation with Strum, Strum told him he owned the building and that plaintiff said he did not know the lessees and that Strum told him not to worry, that he would get his money. On cross examination plaintiff said he explained to Strum the contract and extras when he was about half through with the job and that it was a lot of work and that Strum told him not to worry, that he would see that plaintiff got his money. Two men working on the job testified to having seen Strum in the building. one of them on two occasions and the other on one occasion. Harvey Gershien testified that the business was in operation during the installation of the wiring; that Strum was a customer and would come and buy things at the delicatessen and would look around while the work

Associated as I was with the telephone exchange, I was
July 25 decided he had been and that I was to stay. I was
me for the job, I recommended you for this job. I was
himself from the bank about 1900 and I had been very busy
decision and I was very busy. I was to be in the
best job you can get in because it was ever and I don't
want to have to go to additional work or have to give up. I
also decided that I was to be in the building during
and work on several occasions, both during installation in the
original work and the latest. On one occasion I was in
set from on the street and called the attention of the writer,
and he said that he was very busy, that the letters were not
it. On one occasion I was in the building and the writer
of the first conversation with him, I was not in the building
with him and I was not in the building and I was not in the
that I was not in the building, that he would not be in the
On one occasion I was in the building and I was not in the
first and after that he was not in the building and I was not
that I was a lot of work and that I was not in the building, that
he would see that I was not in the building. The next morning on the
job decided to have some more in the building, and in the
two occasions and the other in the building. I was not in the
decided that the writer was in the building during the time I was
of the writer; and I was not in the building and I was not in the
think of the writer, and I was not in the building and I was not in the

was progressing.

The defendant Nathan Strum denied all conversations with the plaintiff, although he did say that he knew the lessees were fixing the room up. We have carefully examined the abstract of his testimony and we fail to find any denial by Strum that he was in and out of the building during the progress of the work.

From the foregoing resume' of the evidence it is apparent that there is an abundance of evidence to support the allegations of the complaint to the effect that defendant Strum knew of the contract, the ordering of the extras, the installation of the same and made no objection to the installation of the electric wiring system. The Master saw and heard the witnesses and was in the best position to judge their credibility and the weight to be given to their testimony. The foregoing facts clearly bring the case within the Mechanics Lien Act as being an improvement knowingly permitted by the owner. Loeff vs. Meyer, 284 Ill. 114, 119 N.E. 908; Young vs. Bergner, 243 Ill. App. 473; Johns-Manville Corp. vs. La Tour D'Argent Corp., 277 Ill. App. 503; Bingaman vs. Dahr, 307 Ill. App. 432, 30 N.E. 2d 509; Mutual Construction Co. vs. Baker, 237 Ill. App. 596. The case of Sorg vs. Crandall, 233 Ill. 79, 84 N. E. 181, relied upon by defendants, is not in point. This case was decided at a time when there was no statutory provision for establishing a mechanics lien against an owner who knowingly permitted the improvement.

In the second place, the defendants contend that the items

was therefore

The defendant's own testimony during the trial was

that the defendant, although he did not see the person
who was killed, he saw the person who was killed the defendant
at the time of the shooting and he saw the person who was killed
at the time of the shooting and he saw the person who was killed

from the defendant's own testimony at the trial it is apparent

that there is no evidence of evidence in support of the defendant's

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at the time of the shooting and he saw the person who was killed

from the defendant's own testimony at the trial it is apparent

furnished and work done were not lienable. In this connection it is defendants' contention that the items installed were to service trade fixtures and that therefore they come within the same category as trade fixtures. Cited in support of this contention are the cases of Fehr Construction Company vs. Postl System of Health Building, 288 Ill. 634, 124 N.E. 315; Darlington Lumber Company vs. Burton, 156 Ill. App. 82; and Haas Electric & Mfg. Co. vs. Springfield Amusement Park Co., 236 Ill. 452, 86 N.E. 248. In the Fehr Construction Company vs. Postl System of Health Building case, supra, it was held that lockers, file racks, shelves and desks, necessary for the use of the premises by the Postl System, were trade fixtures. As noted in the opinion these items were all capable of being removed with ease and their installation was made for the convenience and business of the Postl System and not as permanent improvements. In the Darlington Lumber Company vs. Burton case, supra, the buildings were of a temporary nature and the lease permitted their removal by the tenant at the expiration of the lease. In the Haas Electric and Mfg. Co. vs. Springfield Amusement Park Co. case, supra, it was held that wires strung outside to light a tree, pergola, refreshment stand, etc., for use as a beer garden, were not permanent improvements.

In the case at bar, a new wiring system for the building is involved commencing with the connection at the transmission line. All wiring was placed in conduits. Part of this was installed within the walls. In the ceiling the work is concealed above the present

[illegible]

ceiling. Where possible, in the case of wooden walls the conduits were attached with metal strips and screws. In the masonry walls holes were drilled in the masonry and expansion bolts were used. Outlets in both the walls and floor were installed. The fluorescent lighting fixtures were attached to the ceiling. This electrical system is not a trade fixture. It is a permanent improvement to the real estate, permanently attached thereto and not removable at will without damage to the real estate. It is also significant of the intention of the parties, that although the lessees have long since vacated the building no attempt was made by them to remove any part of the system for which a lien is claimed. Cases sustaining our holding that the electrical system is not a trade fixture, are, *Young vs. Bergner*, supra; *Johns-Manville Corp. vs. La Tour D'Argent Corp*, supra; and *Schmeling vs. Rockford Amusement Co.*, 154 Ill. App. 308. The fact that this system might be used to service trade fixtures does not convert the system into something which it is not.

In their brief defendants contend that the claim for lien was defective. This point was not argued on oral argument. We have examined the claim for lien and are of the opinion that it satisfied the requirements of the statute. The case of *Crandall vs. Lyon*, 188 Ill. 86, 58 N.E. 972, is no longer the law in this state since the passage of the 1903 Mechanics Lien Law.

Finally it is contended that the decree is fatally defective because after finding the amount due the plaintiff, no judgment is

entered on the finding. Counsel confuses the form of a judgment in a case at law and a decree in a chancery case. Here the decree, after finding the amount due, directs its payment and in default thereof that the property be sold. The decree is in proper form.

It is also contended that the time limit of 5 days within which to pay the sum due is unreasonable. The sum is not large and the time for payment was within the sound discretion of the chancellor. In any event it does not appear that objection was made to this time limit, or that a different time limit was suggested by counsel for defendants. If a hardship should develop we think the chancellor can well extend the time for making the payment upon proper showing.

Accordingly the decree of the Circuit Court of Sangamon County will be affirmed.

Affirmed.

Carroll, J., and Reynolds, J., concur.

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47478

MARVIN KAGAN,

Appellee,

v.

KITCHENS OF SARA LEE, INC.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

20 1A 308

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a suit for breach of an oral employment contract. Defendant appeals from a \$4,565 verdict and judgment.

Plaintiff Marvin Kagan, a graduate engineer with refrigeration and air conditioning experience, was hired on a trial basis by defendant, Kitchens of Sara Lee, Inc., a corporation. The employment was made through the efforts of Drake Personnel, Inc., a private employment agency, to whom Kagan, in writing, agreed to pay a percentage fee which amounted to \$1,440. Although Kagan had no baking experience, defendant, Sara Lee, thought it could use him because of his background in refrigeration and air conditioning. He commenced work on October 15, 1956, and on October 31, 1956, plaintiff paid \$684 to Drake Personnel, being one-half of the agreed fee, less a \$36 discount. He was discharged November 10, 1956.

After his discharge he sued Drake for the return of part of the \$684. He made Sara Lee a co-defendant but sought no relief from it. The suit for the fee refund was settled by plaintiff being repaid all but \$284, and Drake was discharged from the suit on June 27, 1957.

On September 20, 1957, plaintiff filed an amended statement of claim, alleging that Sara Lee engaged him for a 6-month trial period to determine if he would be suited for permanent employment, and also that defendant had agreed to pay one-half of the employment fee; that he was wrongfully discharged on November 10, 1956, without prior notice or just cause; that defendant has breached its agreements; and there was due plaintiff \$115.38 for defendant's share of the employment fee and \$5,450.24, salary for the balance of the 6-month period, or a total of \$5,565.62.

Sara Lee answered and raised the factual issues whether there was an agreement on its part to pay part of the employment fee and whether plaintiff was employed for six months or on a trial during a several week probation period.

Plaintiff claimed damages of \$115, being one-half of the adjusted employment fee, and \$4,450 as the balance due on the employment contract, after giving defendant credit for salary received of \$923 and \$900 received through other employment during the 6-month period. The verdict was for \$4,565, on which judgment was entered against defendant.

Defendant filed a post-trial motion, containing points relied upon for relief from the judgment and seeking a new trial. After argument, the court denied the post-trial motion and the relief sought. Subsequently defendant sought leave to file a supplemental amendment to its post-trial motion by specifying additional grounds for relief, which the court denied. We find no error in the denial of this motion. It was discretionary with the court at that point in the proceedings, and the discretion was not abused.

Defendant urges several points which were not specified in its post-trial motion. These include alleged perjury by plaintiff in the pleadings, and the removal of the pleadings from the court file by counsel for plaintiff; that the amount of the damages was in error and at variance with the evidence; and error in denial of defendant's motion for a directed verdict at the close of plaintiff's case.

The failure to specifically point out these errors in defendant's post-trial motion constitutes a waiver of such points on appeal, and they are not available for review in this court. Sec. 68.1 (2), Civil Practice Act; Donnelly v. Pennsylvania R. Co., 342 Ill. App. 556; Richman Chemical Co. v. Lowenthal, 16 Ill. App.2d 568.

Defendant's principal remaining contention is that the verdict is against the manifest weight of the evidence. In order for a verdict to be contrary to the manifest weight of the evidence, where the evidence is conflicting, as in the instant case, an opposite conclusion must be clearly evident. Griggas v. Clauson, 6 Ill. App.2d 412, 419.

Plaintiff testified that he and Kollman, a Sara Lee vice president, had several conversations in which Kollman agreed to hire him for six months and to pay one-half the Drake fee. Plaintiff also testified that Kollman told him that he was being discharged because the Sara Lee president "did not like him." Kollman denied that the conversations were as related by plaintiff and stated there was no employment for a specific period, and that plaintiff was discharged for "lack of qualifications." The Sara Lee president and comptroller also testified,



but the vital question for the jury was the credibility of plaintiff and Kollman.

The evidence for plaintiff on the employment period and the agreement to pay one-half of the employment fee is buttressed by whatever inferences the jury might logically make from the exhibits in evidence and the various notations. The Drake Personnel contract was dated September 17, 1956, signed by plaintiff, and provides for a 12% fee of the yearly salary. The court admitted this in evidence, over the objection of defendant, as evidence of the agreement between Kagan and Drake, and for whatever probative value it had in that respect. We do not believe this to be improper or that the jury was misled as to why it was received.

Plaintiff's application to defendant for employment contained the notation in Kollman's handwriting, "\$12,000 60 days--\$13,000 start 10/15/56," and showed his qualifications and that he was referred by Drake Personnel. The circular from Drake, setting forth plaintiff's qualifications, shows a notation in pencil, "Fee on 12,000 12%--\$1440--less 2%," also "Period of trial 2-3 mos.--Only Charge Service Fee." This exhibit contains indentations showing that certain pencil writings have been erased, but the indentations are sufficient to indicate the words attempted to be erased, and they are "S. Lee will pay 50%. Employee 50% subject to reimbursement @ 6 mos." Another exhibit was the invoice from Drake Personnel to Mr. Lubin for the sum of \$720. These exhibits had not been in the possession of plaintiff

at any time, and from them the jury could reasonably infer there must have been some conversation regarding payment of the Drake employment fee. Moreover, the attempted erasure tends to sustain plaintiff's version that defendant was to pay 50% and plaintiff was to be reimbursed his half at the end of six months. This could justify the jury in the ultimate belief in plaintiff's version of the conversations rather than the Kellman version. We conclude that this is not a case in which an opposite conclusion to that of the jury is clearly evident and, therefore, the verdict is not against the manifest weight of the evidence.

Defendant contends that counsel for plaintiff made inflammatory and prejudicial remarks to the jury during his final argument and summation of the evidence. One instance is the reference to defendant corporation being merged with another corporation in which its president owns stock. This was improper, but we believe its effect, if any, was cured by the court promptly and vigorously sustaining the objection to it. Another instance is the reference to the attempted erasures on the document in evidence. This exhibit was received in evidence generally and without restriction, and we think the reference to the pencil indentations was proper--particularly where the exhibit was handed to the jury for inspection. Also, no objection was made to this and no ruling of court was sought at that time. Another instance is the reference by counsel to a notation, "they are taking notes," which appeared on the reverse side of a letter dated November 16, 1956, from defendant to Drake Personnel. The

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statement was in the handwriting of Mr. Kollman and was read in evidence by counsel for defendant, although the letter itself was not put in evidence. On objection, the court ruled that the remarks were proper comment. We see no error in this ruling. We conclude that the final argument made by counsel for plaintiff did not prejudice the rights of defendant.

For the reasons given, the judgment is affirmed.

AFFIRMED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.

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47335

WALTER J. O'HARA,

Appellee,

v.

JULIO CARRILLO, JOHN FILKO,
HAROLD B. RAPP and F. & B.
MANUFACTURING COMPANY,
a corporation,

Defendants below

On Appeal of JULIO CARRILLO,

Appellant.

20 I.A. 304^{2d}

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED
THE OPINION OF THE COURT.

Suit was brought by Walter J. O'Hara against Julio Carrillo, John Filko, Harold B. Rapp and F. & B. Manufacturing Company, a corporation. The amended complaint filed in the suit asked for an injunction, the dissolution of the partnership alleged to exist between the plaintiff and the defendant Carrillo and for an accounting. Answers were filed by the defendants to the amended complaint. The cause was referred to a master in chancery. Hearings were had and a report made by the master, in which report he found that in 1936 O'Hara and Carrillo entered into a partnership arrangement and he recommended that the court enter a decree of dissolution of the partnership without taking any further testimony and that the question of accounting between the parties should be referred to a master for hearing. Objections were filed to the master's report, which were argued as exceptions before the court. The court thereupon on June 7, 1957 entered an order overruling the objections, finding that in 1936 O'Hara and

Carrillo had entered into a partnership arrangement, and ordered that an account should be taken with reference thereto. From that order this appeal is taken.

The case was before this court once before, O'Hara v. Carrillo, 18 Ill. App.2d 106, at which time a motion to dismiss the appeal was filed by O'Hara. The court, under the authority of Ariolo v. Nigro, 13 Ill.2d 200; Hanley v. Hanley, 13 Ill.2d 209; and Smith v. Hodge, 13 Ill.2d 197, dismissed the appeal, with the further provision that if the trial court upon the application of Carrillo should enter an order that no just reason exists for delaying the appeal, and if a supplemental record incorporating such order be filed within 30 days from the date of the filing of the opinion, the court would vacate the order dismissing the appeal and decide the case upon the record as thus supplemented and the abstract and briefs heretofore filed. This direction was complied with. O'Hara urged on oral argument that in spite of the order entered by the trial court in substantial compliance with section 50 (2) of the Civil Practice Act (Ill. Rev. Stat. 1957, chap. 110, par. 50 (2)), nevertheless there is no final judgment before this court for determination. We find no merit to this contention under the authority of Hanley v. Hanley, supra.

There have been three suits filed growing out of the business relationship of Carrillo and O'Hara, and the matter has been twice in courts of review.

Carrillo in 1936 owned all of the capital stock of

the Middle West Export Corporation and had full control thereof. In the same year O'Hara, while only owning one share of the 82 shares outstanding of the Automotive Export Association, managed and controlled it. Both Carrillo and O'Hara carried on their separate ventures in Chicago exporting automotive supplies to different parts of the world, and they carried on their business in common quarters. In that year they combined their businesses. Carrillo claimed that O'Hara had promised to give him 50% of the stock in Automotive. No stock was issued to Carrillo. From 1936 on the parties operated the corporation together, drawing from it what money was available for use as salaries. A building had been purchased in 1939, title to which was taken in the name of O'Hara. Carrillo claimed that O'Hara held the title in trust and that he was entitled to one-half interest in the building. It was out of this dispute that the litigation grew which terminated in the Supreme Court as reported in Carrillo v. O'Hara, 400 Ill. 518.

Some time around 1936 one Aprahamian, also an exporter of automotive supplies, became involved with the two men in a common venture in the export field. He went to Africa to sell the products of the manufacturers who were represented in the export field by Carrillo and O'Hara. Money was contributed towards this expedition by both. The name of the Automotive Export Association was changed to Automotive Export Association (1936) Inc. O'Hara resigned as president and Aprahamian became president. O'Hara was vice president and Carrillo was a director and the treasurer. Neither at that time nor since has Carrillo owned any stock in the

corporation, nor did Aprahamian. Besides this venture Carrillo and O'Hara were involved in many other business ventures related directly or indirectly to the automotive field and products. With the commencing of the war, because of restrictions thereby imposed the business dwindled and in the fall of 1943 Carrillo filed the suit heretofore referred to concerning the building which had been purchased, and about that time both Carrillo and O'Hara went to work for other employers. Carrillo went to the only two corporations for which Automotive at that time was doing any business, namely, Skilsaw and F. & B., and told the representatives of each of them that he was no longer working with O'Hara and that he would not be associated any longer with Automotive. Skilsaw cancelled its arrangement with Automotive and did no further business with either O'Hara or Carrillo. F. & B. hired Carrillo, who worked for it from 1943 to 1945 on a part time job, working days at other jobs and doing export work for F. & B. in the evening. In 1946 F. & B. put Carrillo into its office full time, paying him a salary for part time work on its domestic business and commissions for part time work on its export business. Sometime thereafter when the export business increased Carrillo went on a straight commission basis with the title of export manager and with authority to bind F. & B. in its export dealings. These commissions paid Carrillo are involved in the instant suit. By his amended complaint filed December 19, 1949 O'Hara sets up the existence of a partnership between him and Carrillo, and, among other things, alleges that the defendants F. & B. and Carrillo deceitfully and fraudulently

combined and conspired to keep for themselves the foreign export business. He further alleged that the partnership has not been dissolved; that he is entitled to his interest in the commissions collected from F. & B. from 1943 to the date of filing suit; that from 1943 until the date of filing the suit Carrillo has been a trustee for any partnership assets which have accrued to the benefit of O'Hara. He prays for an accounting of all money received by Carrillo and the other defendants from any of the persons named in the complaint for whom the plaintiff O'Hara and the defendant Carrillo "have heretofore and do now represent as 'co-partners and sale representatives'" and that the partnership existing between O'Hara and Carrillo be dissolved.

To this complaint Carrillo filed an answer, in which he denies the existence of any partnership. He admits that since 1943 he has been employed by F. & B. and that he has received money therefrom, but he denies that the plaintiff is entitled to any portion of it or to an accounting. He alleges that all matters between plaintiff and defendant have been fully settled for more than five years last past and pleads the statute of limitations together with the defense of laches. An answer was also filed by the other defendants.

The matter was referred to a master in chancery and hearings were had. At the end of the plaintiff's case the defendant moved for a finding, which was denied by the master without prejudice to make a similar motion at the close of all the evidence. Further hearings were held and evidence was introduced

before the master both by Carrillo and O'Hara, and the master on April 29, 1955 filed his report upon which the order of the Superior Court heretofore referred to was predicated. In that order the Superior Court, after finding that from 1936 on a partnership existed between O'Hara and Carrillo, ordered that an account should be taken of all dealings conducted by plaintiff and defendant in the name of Automotive Export Association (1936) Inc. from 1936 to the date of the order, together with an account of rents collected and payments made on the building involved in the case reported in 400 Ill. 518 up to the time of the handing down of the Supreme Court's decision together with an accounting from defendant's counsel, who had been appointed by the court as receiver for the building, and it also ordered an account as to all earnings and commissions arising from the export business of F. & B. paid to the defendant from January 1, 1944 to the date of the order.

Carrillo v. O'Hara, 400 Ill. 518, grew out of a suit in equity filed by Carrillo in the Circuit Court in 1943. In that suit he claimed that he was entitled to a one-half interest in certain real estate which had been purchased in 1939 during the time he and O'Hara had been engaging in various business activities heretofore referred to. Title to the real estate had been taken in O'Hara's name. In that case the Supreme Court found that the business arrangement between Carrillo and O'Hara from 1936 to the time when they severed their relations constituted an all-embracing partnership and that O'Hara held the title to the real estate in trust for Carrillo to the extent of his

interest and directed an accounting concerning it to be had under the direction of the chancellor. The opinion of the Supreme Court in that case was filed on September 24, 1948, and the Circuit Court on January 11, 1949 entered a decree ordering an accounting as to the property and a further accounting from O'Hara as to the profits from the Automotive Export Association (1936) Inc. On June 3, 1949 the Circuit Court denied O'Hara leave to file a counterclaim. O'Hara in the proceedings objected to the court's refusal to order a complete and full accounting covering the entire period of the existence of the partnership, which in effect would amount to a winding up of the business. The decree of the Circuit Court approving the master's report with reference to the directed limited accounting was entered on January 17, 1951. No appeal was taken from the decree of the Circuit Court. While that suit was pending the instant suit was filed on August 18, 1949. Whether or not the Circuit Court was in error in not ordering a complete accounting and winding up of the affairs of the partnership at that time is not presented for our consideration.

In the case before us Carrillo again urges that the arrangement between the two parties was not a partnership but rather was a joint venture. That question was set to rest for all time by the decision in Carrillo v. O'Hara, supra, and even if it were not we do not think that the question is material. As was said in Meyer v. Sharp, 341 Ill. App. 431:

"The lengthy pleadings and some of the arguments on this appeal were devoted to the question whether the

arrangement between these parties constituted a series of joint ventures, or a partnership. This is indicative of a common philosophy, that if only a legal name can be tacked to a given situation, all problems are magically solved. As a matter of fact, where the rights of third parties are not involved, and the only question is what were the terms of the agreement, the christening of the relationship with some legal term solves nothing. 'A joint venture, as well as a partnership, is controlled by the terms of the agreement under which it is formed or created.' Harmon v. Martin, 395 Ill. 595. It is wholly immaterial whether it be called a joint venture, or a partnership, or even a 'company,' as the parties chose to call it; the rights and obligations of the parties still depended upon their own precise agreement in all particulars, including dissolution, or termination."

In the case before us it is necessary to determine the time of the dissolution of the arrangement between O'Hara and Carrillo—no matter what it might be called.

Carrillo contends that the partnership was dissolved in the fall of 1943 at the time when he filed his suit in the Circuit Court seeking to establish a constructive trust with reference to the real estate and that the partnership having been then dissolved, the right to an accounting for the purpose of winding up the partnership affairs is barred by the five-year statute of limitations. O'Hara, in answer to the defense of the statute of limitations, says that there had been no decree dissolving the partnership. The Uniform Partnership Act (Ill. Rev. Stat. chap. 106-1/2) provides in section 31 that a partnership may be dissolved by the express will of any partner when no definite term or particular undertaking is specified. Section 30 provides that on dissolution the partnership is not terminated but continues until the winding up of partnership affairs. Section 33 provides that dissolution terminates the authority of partners to act for the partnership except insofar as



it may be necessary to wind up partnership affairs or to complete transactions begun but not then finished.

We find from the record that after 1943 both parties discontinued all of the business ventures in which from 1936 they had been jointly engaged. They both sought and secured employment elsewhere. In Richardson v. Gregory, 27 Ill. App. 621, affirmed in 126 Ill. 166, the court says:

"A partnership is dissolved when both parties refuse to go on with the business. It is as effectual to dissolve a partnership as though there was an express agreement to dissolve. Both parties may by statements and acts treat the partnership as ended. * * *

"A partnership closes when there is an end put to the business itself. Bank of Montreal v. Page, 98 Ill. 119; Spurk v. Leonard, 9 Ill. App. 174.

"The statute of limitations begins to run from the termination of the partnership in actions of account or bills in chancery to settle partnerships. Pierce v. McClellan, 93 Ill. 245; Quayle v. Guild, 91 Ill. 378; Askew v. Spring, 111 Ill. 662; Bonney v. Stoughton, 18 Ill. App. 562."

See also Simpson v. Shadwell, 264 Ill. App. 480. From the record the conclusion must be drawn that the partnership existing between the parties was dissolved in the fall of 1943, and this is further supported by the fact that in Carrillo v. O'Hara, *supra*, the Supreme Court found from the evidence before it in that case that Carrillo "devoted all his time and labors to the new arrangement covering Automotive 1936, and related ventures, from 1936 to the time he and O'Hara severed their relations many years later." (Italics ours.) Unless the statute of limitations was tolled it barred any action by either of the parties for an accounting and a winding up of the partnership affairs.



It is also the rule that upon the dissolution of a partnership either party may seek other employment without any liability or responsibility to his partners. After the dissolution of the partnership in 1943 O'Hara contributed nothing either in services or capital to the continuation of any business transaction by way of partnership. As a matter of fact at the time of the dissolution the only tangible asset in the partnership was the real estate concerning which the litigation resolved in Carrillo v. O'Hara, supra, arose. It is true that sometime in 1936 \$2,500 had been advanced by the partners to finance the activities of Aprahamian and that from 1943 on Aprahamian did make certain sales for F. & B. for which commissions were paid to Carrillo, which commissions are involved in the instant suit. O'Hara contends that Carrillo fraudulently concealed from him the fact that as an employee of F. & B. he was receiving commissions on sales made through the instrumentality of Aprahamian and that consequently the five-year statute of limitations is tolled under section 22 of the Limitations Act (Ill. Rev. Stat. chap. 83, par. 23), which provides: "If a person liable to an action fraudulently conceals the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within five years after the person entitled to bring the same discovers that he has such cause of action, and not afterwards." O'Hara contends that he did not learn that Carrillo was receiving the commissions claimed until 1948. "The concealment of a cause of action which will prevent the operation of the statute of limitations



must be something of an affirmative character, designed to prevent, and which does prevent, the discovery of the cause of action. Mere silence by the person liable does not amount to fraudulent concealment of a cause of action. Such concealment must consist of affirmative acts or representations; there must be some trick or contrivance or affirmative action intended to exclude suspicion and prevent inquiry." 25 I.L.P. Limitations, sec. 92.

In Jackson v. Anderson, 355 Ill. 550, the court held that a failure by stockholders to learn of the existence of their cause of action for the issuance of corporate stock for property sold to the corporation until a year prior to filing of the bill did not prevent running of the statute of limitations in the absence of allegation and proof of fraudulent concealment, and the court says: "There is no showing of any reason why the complainants could not have learned in 1926 of the facts which they claimed to have learned in 1931. There is no showing of any diligence to learn such facts * * *."

In Skrodzki v. Sherman State Bank, 348 Ill. 402, the court said:

"In Lancaster v. Springer, 239 Ill. 472, this section [sec. 22] was construed as follows: 'The concealment of a cause of action which will prevent the operation of the Statute of Limitations must be something of an affirmative character designed to prevent, and which does prevent, the discovery of the cause of action. * * * Such concealment must consist of affirmative acts or representations,' * * * [citing cases]. In Keithley v. Mutual Life Ins. Co., 271 Ill. 584, this court considered that section. It was there held that mere silence by the person liable is not concealment of a cause of action, but that such concealment must consist of affirmative acts or representations. It was there also held that fraudulent misrepresentations which form the basis of the cause of action do not constitute a fraudulent concealment in the absence of proof of acts or representations tending fraudulently to conceal the cause of action, and that the rule that the statute begins to run only from the discovery



of the fraud does not apply when the party affected by the fraud might with ordinary diligence have discovered it. * * *

The burden was upon O'Hara to show that he has a right to an accounting. Anderson v. Anderson, 339 Ill. 400. O'Hara also had the burden of bringing himself within the exceptions provided for in section 22.

O'Hara testified that at the time of the instant suit the only assets which he considered to be partnership assets were the real estate and the F. & B. line. He also testified that it was only in 1948, when the Supreme Court's decision came down holding that he and Carrillo were co-partners, that he ascertained the commissions that Carrillo had collected from the time he started his suit until the middle of 1949 on the F. & B. line. He also testified that in 1943 he had talked to a Mr. Rapp at F. & B. and that Rapp had told him that Carrillo had been in to see him and asked them to cancel out Automotive and to give the line to him, but that Rapp did not tell O'Hara that F. & B. had complied with the request. O'Hara also testified that he did not know when Carrillo started working full time for F. & B. and that he could not say positively as to whether or not at the time of the hearing before the master in the Carrillo v. O'Hara case reported in 400 Ill. 518 he knew that Carrillo was working at F. & B. O'Hara also testified that he had devoted none of his time to F. & B. after 1944. This is the only evidence in the record upon which a tolling of the statute of limitations might be based. It is not sufficient. O'Hara has failed to sustain his burden of proof by a preponderance of the evidence.



It is not incumbent upon us to determine, in a case such as this where there was no definite term fixed for the duration of the partnership and where the entire success of the business venture rested solely upon the services and qualifications of the parties, whether O'Hara could have stood by and, after Carrillo had spent time and effort in rehabilitating a business which was at its nadir at the time of its dissolution, make a claim for a share in the profits earned, even though the bar of the statute of limitations had not been interposed. In the case before us the issue of the statute of limitations was properly raised by Carrillo in his pleadings and in the exceptions taken to the master's findings. We find that the partnership existing between O'Hara and Carrillo was dissolved in 1943. More than five years had elapsed between the dissolution of the partnership and the filing of the instant suit. The statute of limitations bars the maintenance of this suit unless it was tolled under section 22 of the limitations statute. We appreciate the rule that where the court enters a decree or order in accordance with the findings of a master in chancery it cannot be set aside unless it is against the manifest weight of the evidence. See Amos v. Helwig, 19 Ill. App.2d 220, and cases therein cited. Here under the rule governing the application of section 22, which we have previously discussed, the evidence is not sufficient to sustain the contention that the statute of limitations was tolled. Unless such a conclusion could be reached, the suit cannot be maintained.

We find that the order of the Superior Court was against the manifest weight of the evidence. The order is reversed

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and the cause remanded with directions to dismiss the suit for want of equity.

Reversed and remanded
with directions.

Dempsey and Schwartz, JJ., concur.

Abstract only.



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In the Matter of the Estate of
MELVIN ANDERSON, a Minor

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

WINNIFRED M. HENRY, Guardian of
the Estate of MELVIN ANDERSON,
a Minor,

Appellee,

v.

CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, a
Corporation,

Appellant.

20 I.A.²¹ 305

MR. PRESIDING JUSTICE McCORMICK DELIVERED
THE OPINION OF THE COURT.

The Probate Court of Cook County on December 31, 1945 entered an order authorizing William R. Anderson, as guardian of the estate of Melvin Anderson, his minor son, to settle all rights of action of the said minor against the Chicago, Burlington and Quincy Railroad Company (respondent herein) for the sum of \$10,000. An order of the Probate Court entered on January 17, 1957 vacated and set aside that order and the releases given pursuant thereto. An appeal was taken to the Superior Court of Cook County, and after a trial de novo that court entered substantially the same order. This appeal is taken from that judgment order of the Superior Court.

The case grows out of injuries sustained on July 17, 1945 by Melvin Anderson, a minor at that time 6-1/2 years old. On that date he was run over by a Chicago, Burlington and Quincy Railroad Company train, sustaining injuries which required the amputation of both legs, the right leg at the junction of the hip, and the left leg at the knee. His

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father and mother retained the law firm of Finn and Fitzpatrick. On August 6, 1945 Mr. Fitzpatrick opened an estate for the minor in the Probate Court and the father was appointed guardian. On December 31, 1945 the Probate Court entered an order permitting the guardian Anderson to compromise the claim against the respondent for \$10,000. The respondent paid the money and the guardian executed a full and complete release.

In its order of January 17, 1957, the Probate Court vacated the prior order of the court which had been entered on December 31, 1945 together with all releases executed by Anderson pursuant to such order and appointed Winnifred M. Henry, the public guardian of Cook County (petitioner herein), as successor guardian with authority to employ counsel and if necessary file legal action on behalf of the minor against the respondent. The respondent took an appeal to the Superior Court from that order. The matter was tried de novo before a judge of the Superior Court. Evidence was presented on behalf of the petitioner and the respondent, and the court on September 27, 1957 entered an order finding that a fraud was perpetrated upon the Probate Court and the minor in the entry of the order of December 31, 1945 and it ordered that such order be vacated together with all releases executed at that time by the guardian. The respondent on October 7, 1957 filed a post trial motion moving the court to set aside the judgment and grant a new trial. This motion was denied and this appeal followed.

The respondent here contends that both the Probate

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Court and the Superior Court were without jurisdiction of the parties and the subject matter of the controversy in entering orders vacating the order of the Probate Court authorizing the compromise settlement and in setting aside the releases signed by Anderson in pursuance thereto, and contends further that the final order of the Superior Court was not supported by the evidence.

The respondent urges that the Superior Court had no jurisdiction to enter the order of September 27, 1957. In that order the Superior Court found that the Probate Court had jurisdiction to enter the order of January 17, 1957, which was the order from which the appeal was taken to the Superior Court; that the Probate Court had jurisdiction to appoint Winnifred M. Henry as successor guardian to William R. Anderson; that a fraud was perpetrated upon the Probate Court and upon the minor by the entry of the order of December 31, 1945 authorizing Anderson as guardian of the estate of the ward to compromise and settle the right of action for \$10,000 and to execute a release in accordance therewith, inasmuch as that order was procured by interests adverse to the minor without a full disclosure of all the facts to the Probate Court. The Superior Court order vacated the Probate Court order of December 31, 1945 together with the releases executed thereunder. This appeal is taken from the order of the Superior Court.

1 It is the law that upon an appeal from the Probate Court to the Circuit or Superior Courts there can be no jurisdiction in the latter courts unless there had been jurisdiction

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in the Probate Court in the first instance. In re Estate of Shanks, 282 Ill. App. 1; Chapman v. American Surety Co., 261 Ill. 594; In re Estate of Lalla, 281 Ill. App. 124. Hence it becomes necessary to consider the proceedings in the Probate Court. 455

This matter was brought to the attention of the judge of the Probate Court who referred the matter to Winnifred M. Henry, public guardian for Cook County, who, on January 20, 1956, filed a petition in the Probate Court alleging, among other things, that Melvin Anderson was a minor born September 20, 1938; that his place of residence was Downers Grove, Illinois; that he had a personal estate of approximately \$10,000; that one Gertrude Ketcham had been appointed guardian of the person of the minor by the County Court of Du Page County, Illinois in 1949. The petition prayed that letters of guardianship be issued to the said Winnifred M. Henry, and attached to the petition was the consent of Mr. and Mrs. Anderson, the parents of the minor. On the same day the Probate Court entered an order appointing Winnifred M. Henry guardian of the estate. 458

On March 9, 1956 an order was entered which authorized the guardian to employ John E. Owens, an attorney at law, as guardian ad litem for the purpose of conducting an investigation into the facts and circumstances surrounding the settlement and adjustment of the ward's right of action. On March 16, 1956 Owens filed a report as guardian ad litem. Notice was then served upon the respondent advising it that Winnifred M. Henry would ask for an order in accordance with the prayer of the petition thereto attached. The petition was filed on May 21, 1956 by her as 5640

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guardian of the estate of the minor. The petition, after making certain factual allegations, prayed that the said order of December 31, 1945 and the releases signed in pursuance thereto should be vacated on the grounds that the minor had no legal representation at that time; that the court had been imposed upon for the reason that the facts had not fully been disclosed to the court and that if they had been known the order would not have been entered.

The respondent, having filed a special appearance, on August 17, 1956 filed objections to the jurisdiction of the court, alleging, among other things, that the court had no jurisdiction to entertain the petition; that the court was without jurisdiction to appoint Winnifred M. Henry guardian of the estate of the minor; that her appointment as guardian and the orders entered subsequent to such appointment were a collateral attack on a prior order of the Probate Court; that the Probate Court's jurisdiction ended on January 9, 1947 when "it discharged the Guardian, William R. Anderson, and entered an order closing the Estate of Melvin Anderson, a minor"; that the petition to set aside the releases under seal is an attempt to adjudicate the rights of a third party, the respondent; and that the court has no jurisdiction over said party.

The court on September 27, 1956 entered an order overruling the objections of the respondent to the petition. Notice was then given to the respondent that the case was set for trial on January 17, 1957, and on that date the Probate Court entered an order in which it stated that it had come to the attention of the court that the order authorizing the compromise and settlement

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of the right of action was induced by conduct which may have resulted in a fraud being perpetrated on the court and the ward; that the court thereupon appointed a guardian ad litem and from the report of his investigation found that there was reasonable and probable cause for the court to hear evidence in order to determine whether such fraud had been perpetrated; that evidence having been heard the court finds it had jurisdiction of the parties and subject matter for the purpose of determining whether such a fraud had been perpetrated. The order recites as the court's findings the accident, the nature of the injuries to the minor, the appointment of the minor's father as guardian and his employment of the firm of Finn and Fitzpatrick to represent him; the subsequent proceedings leading up to the entry of the compromise order; and that fraud was perpetrated on the court and upon the minor. The court also finds that the appointment of Winnifred M. Henry as guardian of the estate of the minor was premature, and ordered that her appointment be vacated and set aside nunc pro tunc as of January 20, 1956; that the order of January 9, 1947 discharging Anderson as guardian be vacated and set aside nunc pro tunc as of January 9, 1947; that the letters of guardianship issued to Anderson be revoked and that he be removed as guardian for the minor nunc pro tunc as of January 3, 1956; that Winnifred M. Henry be appointed as successor guardian of the estate of the minor nunc pro tunc as of January 20, 1956. The court in its order vacated the order entered on December 31, 1945 and all releases executed by Anderson pursuant to such order and ordered that the successor guardian is authorized and directed to employ counsel and, if necessary, file legal action on behalf of

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the minor against the respondent. The respondent took an appeal to the Superior Court from that order.

[43] The respondent makes a point of the fact that since in the first petition filed by Winnifred M. Henry it is set up that the residence of the minor was then in Du Page County, her appointment was improper and is in conflict with section 133 of the Probate Act (Ill. Rev. Stat., chap. 3, par. 285), which provides that when a minor is a resident of the State, the guardian of his estate and person must be appointed by the Probate Court of the county in which he resides. The respondent misapprehends the question involved. When a guardian is appointed by a Probate Court having proper jurisdiction in the first instance, the guardian will continue in his office irrespective of the fact that his ward has removed his residence from the county. Cobleigh v. Matheny, 181 Ill. App. 170. That is the situation we have here. The appointment of the public guardian as guardian of the estate of the minor was not an original appointment by the court. When Anderson was appointed guardian in the first instance the estate of the minor was located in Cook County and the minor was also domiciled therein. The contention of the respondent in this respect is untenable. At the time that the Probate Court acted in 1956 the estate of the minor was still located in Cook County, the estate had not been closed, and the appointment in the first instance of the public guardian was for the purpose of having her investigate the question as to whether or not there had been fraud, misrepresentation or the concealment of material facts in the entry of the compromise order of December 31, 1945.

45 Courts have an inherent power to set aside their own judgments where the judgment was obtained by fraudulent collusion between the parties. The court may act on its own motion. As a corollary to that principle it follows that where a court has determined that it has reasonable cause to believe that a judgment or order entered by it had been fraudulently obtained that court may appoint a person or persons to investigate and make a report to it concerning the same. In 1955 the legislature enacted section 323a of the Probate Act (Ill. Rev. Stat. chap. 3, par. 477a), which authorized the court to order the assets of the minor's estate, where they consist only of money, to be deposited in a bank subject to the order of the court, and further providing, where a guardian in the first instance had been appointed, that upon his filing a final account the guardian and his sureties would be discharged "until further order of the court." The same practice had prevailed in the Probate Court prior to the enactment of the statute and was controlled by rule of court which provided that the court, where the ward's assets consist only of money, may upon petition order the deposit of the money in a bank subject to the order of the court and direct the guardian or conservator to file a final account. Under that rule it was also considered that the court might properly order the money to be invested in United States government bonds. This rule was controlling at the time of the entry of the order in 1945. An order of the Probate Court provided that the \$10,000 received by the guardian in compromise of the minor's claim and which was deposited in the Mercantile National Bank of Chicago should be used to purchase United States defense bonds in the name of the minor. That order of the Probate Court further

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provided that the Federal Reserve Bank of Chicago should keep the bonds for safekeeping subject to the "further order of this court, and until said minor attains his ~~***~~ majority." This order of the Probate Court was carried out. The guardian was discharged, but the estate had not been closed since the assets of the estate were still under the control of the Probate Court. Consequently the court under its continuing jurisdiction would have had the right to appoint a successor guardian. Such appointment is a matter within the discretion of the Probate Court and would not be governed by section 133 of the Probate Act but would be an appointment in accord with the continuing jurisdiction of the court over the estate.

→ [6-8] The next contention of the respondent is that the Probate Court had no jurisdiction to enter the order of January 17, 1957 since the petition was filed more than 30 days after the entry of the order, and that under the rule prevailing in this State it was a collateral attack upon the action of the court. "It is the public policy of the State that courts guard carefully the rights of minors, and a minor who is a party to an action is a ward of the court, and it is the duty of the court to see that the minor's rights are protected. The fact that the court has appointed a representative for the minor does not relieve the court of its duty to protect the minor's interests, and the court on its own motion will intervene to protect the rights of a minor entitled to relief ~~***~~." 27 I.L.P. Minors sec. 73; Feldott v. Featherstone, 290 Ill. 485; McCarthy v. Cain, 301 Ill. 534. A court of chancery has the power to set aside a judgment obtained

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by fraudulent collusion between the parties. Elting v. First National Bank, 173 Ill. 368. Lack of jurisdiction or fraud is a ground for vacating a judgment after the expiration of 30 days from its entry. City of Chicago v. Nodeck, 202 Ill. 257, 268. The Probate Court has a continuing jurisdiction over an estate until the estate is closed. In Tisdale et al. v. Davis, 198 Ill. App. 116, the court says: "County and Probate Courts are courts of general and unlimited jurisdiction in matters of administration, and exercise an equitable jurisdiction adapted to their organization and modes of procedure, and in the exercise of such equitable jurisdiction may, on motion at a subsequent term, set aside an order allowing or disallowing a claim against an estate, where fraud or mistake has intervened." (Citing cases.) See also In re Estate of Blyman, 382 Ill. 520; Hodson v. Hodson, 277 Ill. 137.

In the instant case we find from the evidence taken in the hearing in the Superior Court that, after Finn and Fitzpatrick had opened an estate for the minor in the Probate Court with Anderson as guardian, it had been suggested to Anderson by the representatives of the respondent that he by-pass Finn and Fitzpatrick and come to the office of the respondent on December 31, 1945 to discuss a settlement. On December 31, 1945 Ward Harris, an attorney who had previously represented the respondent in cases 25 or 50 times, was in his home in Evanston. He was called by the respondent and in response to that call came to the office

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by fraudulent collusion between the parties. Elting v. First National Bank, 173 Ill. 368. Lack of jurisdiction or fraud is a ground for vacating a judgment after the expiration of 30 days from its entry. City of Chicago v. Nodeck, 202 Ill. 257, 268. The Probate Court has a continuing jurisdiction over an estate until the estate is closed. In Tisdale et al. v. Davis, 198 Ill. App. 116, the court says: "County and Probate Courts are courts of general and unlimited jurisdiction in matters of administration, and exercise an equitable jurisdiction adapted to their organization and modes of procedure, and in the exercise of such equitable jurisdiction may, on motion at a subsequent term, set aside an order allowing or disallowing a claim against an estate, where fraud or mistake has intervened." (Citing cases.) See also In re Estate of Blyman, 382 Ill. 520; Hodson v. Hodson, 277 Ill. 137.

In the instant case we find from the evidence taken in the hearing in the Superior Court that, after Finn and Fitzpatrick had opened an estate for the minor in the Probate Court with Anderson as guardian, it had been suggested to Anderson by the representatives of the respondent that he by-pass Finn and Fitzpatrick and come to the office of the respondent on December 31, 1945 to discuss a settlement. On December 31, 1945 Ward Harris, an attorney who had previously represented the respondent in cases 25 or 50 times, was in his home in Evanston in bed afflicted with asthma. He was called by the respondent and in response to that call, as the leal clansmen in the Scottish Highlands in days of yore forthwith responded to the summons of the fiery cross, so did Harris. Harris left his bed, dressed and came to the office

of the respondent. When he arrived there it was apparent from the testimony that time was the essence of the transaction. Harris, who was representing the respondent, conferred for 5 to 10 minutes with Anderson, the father and guardian of the minor, whose interests he was supposed to represent. The entire discussion of the case was over in less than three-quarters of an hour. Harris was informed by Mr. Jensen, an attorney and claim agent of the respondent, that there was no legal liability in the case and was given a brief prepared by the respondent's attorneys to read. When Harris learned that Finn and Fitzpatrick were the attorneys who had opened the minor's estate he said he felt he was in an embarrassing position because he would not have time to serve notice on them. Anderson agreed to accept \$10,000 as a compromise settlement of the claim of his minor ward. Harris dictated the petition to be presented to the Probate Court and a certificate attached thereto, in which certificate he stated that he was the attorney for Anderson, the guardian, that he had investigated the circumstances of the accident and was of the opinion that this is a "fair and just settlement." The certificate was signed by him but was not sworn to before a notary because, as Harris testified, of the haste in the preparation of the papers. As he stated: "We were in very much of a hurry that morning and we didn't fill in all of the details, it was late." Harris, Anderson and two representatives of the respondent then rushed to the Probate Court in a taxicab and were admitted to the judge's chambers after the court had adjourned. The facts of the case were presented to the judge by the claim agent of the respondent. Anderson, who

was present, had previously stated to Harris in the office of the respondent that he knew nothing about how the accident had happened. The respondent in its office at the conference that morning had agreed to pay to Anderson and his wife the sum of \$2,500 in addition to the \$10,000 to be paid in compromise of the minor's claim. No information concerning this additional payment was given to the Probate Court judge. Nor was he informed that Harris had been called into the case that morning by the respondent, nor that Harris was at the time representing the respondent. Harris testified, in answer to a question as to whether he had informed the judge that he was being paid by the railroad company: "Oh, yes, I always do. I've settled many cases of this kind."

A situation is created which cries aloud for the exercise of the equitable powers of the court when we consider the facts appearing in the record, namely, the fact that the guardian, a man who needed money and who testified that at the time he was addicted to drink, whose mental and physical condition were not such that he could properly represent his son, was summoned by the respondent to its office on the last day of the year to discuss settlement; the fact that the respondent consciously and deliberately by-passed the attorneys in the case; the fact that Harris, who had previously acted for it in similar matters, was summoned posthaste to the office of the respondent to prepare the petition; the fact that he did prepare the petition certifying that he was representing Anderson when he either knew or should have known that his appearance in the case was in behalf of the respondent; the fact that Harris certified that he had made a complete investigation of the case

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when the only information he had concerning it he received that morning at the office of the respondent and from its agents; the fact that there was such unseemly haste in getting to the Probate Court where the hearing was had before the judge, not in open court but in chambers after adjournment; the fact that Fitzpatrick testified that he or his partner had made a complete investigation of the law and facts and would not have approved the settlement, that he did not think it was fair and equitable; the fact that the same conclusion was reached by Owens, an attorney appointed guardian ad litem by the Probate Court in the present proceedings; the fact that no mention was made in the Probate Court of the payment of \$2,500 to the Andersons over and above the \$10,000 settlement; the fact that Harris did not inform the court that he had only come into the case that morning at the request of the respondent.

There is nothing in the record showing any emergency which would necessitate such urgency in rushing through the settlement. The haste and the fact that no notice was served upon Finn and Fitzpatrick and no substitution of attorneys was entered according to the normal practice in such cases lead to the conclusion that the respondent feared that if there had been any delay Anderson might change his mind. The respondent could also have been activated by the fear that if the matter had been presented to the Probate Court by an attorney who was sincerely and honestly representing the interests of the crippled minor the settlement would not have been approved.

At the hearing Fitzpatrick testified that subsequent to the entry of the December 31, 1945 order he had talked to the

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then judge of the Probate Court who informed him that he had been given the impression that there was some reason why the railroad company could settle on that date and not on a future date. At the time that Finn and Fitzpatrick opened an estate for the minor they served an attorney's lien upon the respondent. Subsequent to the order of December 31, 1945 the respondent paid them their fees based on a percentage of the \$12,500.

[9,10] A guardian, when appointed to administer the estate of a minor, assumes one of the highest fiduciary relationships known to the law. By some courts it has been said that he has a sacred duty to well and truly administer the estate and conserve the rights entrusted to him. A court in approving a settlement of a claim of a minor also has a high duty to protect the minor from the fraud and treachery of his attorneys or guardians so far as is possible, and in the exercise of that duty the court is entitled to rely upon the statements made to him by an attorney purportedly representing the minor and it is evident from the record in this case that the then judge of the Probate Court did so rely. That this reliance was misplaced is also evident in the record. In Williams v. Williams, 204 Ill. 44, a case dealing with the approval of a compromise involving a minor, the court says:

91 "Where such compromises have been carried into effect by courts of equity, the methods employed vary with the circumstances, but there must be a full disclosure of the facts where infants are concerned, and their best interests are the chief ends which are sought to be secured.

92 "In In re Birchall, L. R. 16 Ch. D. 43, it was said by Jessel, M. R.: 'The court can approve a compromise on behalf of infants, but it cannot force

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one upon them against the opinion of their advisers. The practice, followed by myself and by Lord Romilly before me, at the Rolls, has been to require not only that the compromise should be assented to by the next friend, or guardian of the infant, but that his solicitor should make an affidavit that he believes the compromise to be beneficial to the infant, and that his counsel should give an opinion that he considers it to be so."

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Even if Harris were given the benefit of all doubts and it could be considered that he was representing Anderson at the time of the entry of this order, there would seem to be no question that at the same time he was also representing the respondent. In 30A Am. Jur. Judgments, sec. 673, it is said: "By the weight of authority, a judgment in an action in which the same attorney represented both plaintiff and defendant, who were adversely interested, will in the absence of special circumstances be vacated at the instance of the party against whom it was rendered. It was not necessary that there should be actual fraud in the transaction, nor is it necessary that fees should have been paid by the party against whom judgment was rendered." The Probate Court had jurisdiction to enter the order of January 17, 1957 vacating its prior order permitting the compromise of the claim together with all releases issued thereunder. The Superior Court had the necessary jurisdiction to enter the order involved in this appeal and its findings were not against the manifest weight of the evidence. The petition filed in the Probate Court was sufficient to support both the findings and order of that court as well as those of the Superior Court. There is no merit to the contention of the respondent that the Probate Court lacked jurisdiction over it. The respondent instigated and participated in the collusion and fraud practiced on the Probate

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Court on December 31, 1945.

Counsel argues that the order of January 17, 1957 is erroneous in that it is an improper exercise of the right to enter orders nunc pro tunc. Under the view we take of this case this contention is immaterial since the court could have properly, since the estate had not been closed, appointed forthwith the public guardian as guardian of the estate of the minor under its continuing jurisdiction. There was no necessity for the entry of nunc pro tunc orders, and the fact that they were entered did not prejudice the respondent.

We find no error in the record. The judgment of the Superior Court is affirmed.

X Judgment affirmed.

Schwartz, J., concurs.

Dempsey, J., took no part.

Publish in full.

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47376

PEOPLE OF THE STATE OF
ILLINOIS,

Appellee,

v.

BILLY W. SPENCER,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

20 I.A.^{2d} 306¹

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

Defendant while driving his automobile west on 47th street in the City of Chicago at about 7 P.M. on December 23, 1955, made a right-hand turn from the center of the intersection of Pulaski road and struck plaintiff's car. A police officer arrived on the scene and arrested defendant. He was charged with two offenses: first, improperly making a right-hand turn from the center of the street instead of from the lane adjacent to the right-hand side of the road; secondly, driving a vehicle while under the influence of intoxicating liquor. There was ample evidence to sustain both charges. The court found defendant guilty and assessed a fine of \$106 on the charge of driving an automobile while under the influence of liquor and \$5 on the other charge.

We will consider the points and authorities relied upon for reversal which now represent what was formerly the assignment of errors in this court.

Point one is a vague charge with respect to the conduct of the trial judge and opposing counsel, by which, defendant argues, he was denied a fair trial contrary to the "Due Process" provisions of both the state and federal constitu-

tions. This court has no power to pass on constitutional questions. In re: Simaner, 16 Ill. App.2d 48; Rust v. Holland, 15 Ill. App.2d 369. Moreover, it appears to us that defendant was accorded a fair and patient trial.

Point two is that the arrest was made on suspicion only. The evidence is strongly to the contrary. The police officer had reasonable grounds for making the arrest and the defendant was guilty beyond a reasonable doubt.

Point three also charges arrest on suspicion only. It has no merit.

Point four charges that under our "Triumvirate system of fair play," one should not be arrested out of motives of hostility and revenge. No such motives appear in this case.

Points five and six assert that accused is entitled to adequate safeguards and the maintenance of due process of law. These points do not appear to be relevant and, as we have before stated, they present constitutional issues beyond the jurisdiction of this court.

Judgment order affirmed.

McCormick, P. J., and Dempsey, J., concur.

tions. This court has no power to pass on constitutional questions. In re: Simaner, 16 Ill. App.2d 48; Rust v. Holland, 15 Ill. App.2d 369. Moreover, it appears to us that defendant was accorded a fair and patient trial.

Point two is that the arrest was made on suspicion only. The evidence is strongly to the contrary. The police officer had reasonable grounds for making the arrest. The trial court's finding cannot be reversed unless against the manifest weight of the evidence. Amos v. Helwig, 19 Ill. App.2d 220, and cases therein cited.

Point three also charges arrest on suspicion only. It has no merit.

Point four charges that under our "Triumvirate system of fair play," one should not be arrested out of motives of hostility and revenge. No such motives appear in this case.

Points five and six assert that accused is entitled to adequate safeguards and the maintenance of due process of law. These points do not appear to be relevant and, as we have before stated, they present constitutional issues beyond the jurisdiction of this court.

Judgment order affirmed.

McCormick, P.J., and Dempsey, J., concur.

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47453

CERULLI CONSTRUCTION CO., INC.,
an Illinois corporation,

Appellee,

v.

KENNETH PROCTOR and
NEIROSE PROCTOR,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

20 I.A.^{2d} 306²

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment entered against them by confession. On May 29, 1957, plaintiff and defendants entered into a contract whereby plaintiff agreed to furnish materials and labor necessary to perform modernization work on defendants' home, and upon completion of the work defendants agreed to pay the sum of \$1760. On the same day defendants signed a note containing a confession of judgment clause. On October 22, 1957 judgment was entered against defendants for \$1760 plus attorneys' fees and interest, totaling the sum of \$2049.30. On November 21, 1957 defendants moved to open the judgment and as ground therefor averred that at the time they signed the note, certain blanks (which appear on its face) were not filled in, to-wit: the name of the payee and the amount, and that certain delineations eliminating a clause providing for payment in successive monthly installments were not made at or before the time the note was signed; that this was done later without authority; that the note was executed with the understanding that it was to be used in connection with an

application for a FHA Home Improvement Loan from a lending agency; that plaintiff, contrary to the understanding, altered the note by inserting its own name as payee and also inserting provisions for a lump sum payment of \$1760 on a date certain. The court denied defendants' motion to open the judgment by confession, but gave defendants leave to file a counterclaim in ten days and stayed the proceedings pending disposition thereof. This left defendants in a position where they were required to acknowledge the validity of the confession of judgment note and the obligation to pay interest and attorneys' fees.

A person in possession of a negotiable instrument is authorized to fill up the blanks, but in order that such instrument may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. (Ch. 98, par. 34, Ill. Rev. Stat. 1957.) This makes it clear that a defense such as that asserted here is valid against any one not a holder in due course.

Defendants not only alleged that there was no authority given to fill up the blanks in the note, but, in addition, that plaintiff had, contrary to authority and without defendants' knowledge, altered the instrument by scratching out words showing it to be for "FHA only," and also showing that it was negotiable and payable at the

First Federal Savings & Loan Association, Chicago. We think defendants' position is sound. The alterations, if made, were material and invalidated the note. Plaintiff argues that if the contract is examined, it will be seen that the note given was in compliance with it. An examination of the contract reveals the contrary. Other points made by plaintiff are without merit.

The court should hear the issues and if defendants prove their case, should set aside the judgment.

The judgment is reversed and the cause is remanded with directions to take such proceedings as are not inconsistent with the views herein expressed.

Judgment reversed and cause
remanded with directions.

McCormick, P. J., and Dempsey, J., concur.

Abstract only.

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CONTINENTAL ILLINOIS NATIONAL BANK
AND TRUST COMPANY OF CHICAGO, as
Trustee under an agreement with
MERRILL C. CLANCY dated July 5, 1928,

Plaintiff,

v.

DONALD MERRILL CLANCY, et al.,

Defendants - Appellants,

and

FRANK B. CLANCY, et al.,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

20 I.A. 307^{2d}

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Defendant, Donald Merrill Clancy, individually, and as guardian ad litem for his minor children, and as trustee of interests of persons not in being, appealed from a decree which finds that neither he nor issue of his body have any interest in the principal or income of a trust held by plaintiff, Continental Illinois National Bank and Trust Company of Chicago.

The Bank's complaint alleges, among other things, that since the death of Leslie M. Clancy the question has been raised whether Donald Merrill Clancy, the alleged adopted child of Leslie M. Clancy, is entitled to any part of the income of the trust and whether he or his issue will be entitled to any part of the principal upon termination of the trust. The concluding paragraph prays that the court construe the trust agreement as to the income formerly paid to Leslie M. Clancy and as to the distribution of principal upon termination of the trust.

The answer of Donald Merrill Clancy admits the allegations of the complaint but avers that he is the adopted son of Leslie M. Clancy; that he was formally adopted by Leslie M. and Beatrice Clancy on April 5, 1924; that he was taken by them as their adopted child from Christian Home Orphanage in Council Bluffs, Iowa, and thereafter lived in the custody of Leslie M. Clancy as a son; that while the trust agreement contains no explicit provision as to whether this defendant is to be included, nevertheless in the light of surrounding circumstances the instrument includes this defendant as "issue" in Section Third and "grandchildren" in Section Fourth.

The substance of Section Third was to the effect that the net income of the trust was to be paid "in equal shares, per stirpes, to the lawful issue of said party of the first part"; Section Fourth provided for distribution of the principal to the settlor's grandchildren and great grandchildren.

The questions presented by this appeal are: was Donald Merrill Clancy a legally adopted child of Leslie M. Clancy and does Donald Merrill Clancy qualify as a beneficiary under the irrevocable inter vivos trust created July 5, 1928.

During his life Merrill C. Clancy had four children: Frank B. Clancy, Leslie M. Clancy, Marion C. Atherton and Laura L. Clancy. No child or children were adopted by Merrill C. Clancy during his life. On July 5, 1928, the bank entered into a trust agreement in Chicago with Merrill C. Clancy. He died, a resident of Santa Monica, California, on March 28, 1949. Leslie M. Clancy died on June 29, 1954; during his life he never had children of his body, but he raised Donald Merrill Clancy from infancy.

Adoption is unknown to the common law and is created solely by statutory enactment in this state as well as others. See McLaughlin v. People, 403 Ill. 493; 1 I. L. P. Adoption §3. Since the alleged adoption took place in Iowa, in 1924, its validity must be determined by the statutes then in effect in that state. The 1924 Iowa Code provided for adoption by agreement or articles of adoption. The agreement had to be signed, acknowledged and recorded at the parents residence, just as a deed to real estate. The record here shows that the agreement was never recorded anywhere and without recording, the agreement could never become a legal adoption, since at the time this agreement was executed both Illinois and Iowa courts favored a strict and literal construction of adoption statutes. See Keal v. Rhydderck, 317 Ill. 231; 1 I. L. P., Adoption §5. The Iowa Supreme Court in Sheaffer v. Sheaffer, 228 Ia. 779, 292 N.W. 789 holding that because of a failure to record the agreement a child was not an adopted son, said at page 790:

. . . the child does not become the heir of the adopting parent, unless there is a compliance with the mandatory provisions of the adoption statutes, and the recording of the articles of adoption is essential to a statutory adoption.

Likewise in Morris v. Trotter, 202 Ia. 232, 210 N.W. 131, it was pointed out that only by compliance with statutory requirements, including recording, would an adoption be valid. Where the articles of adoption were signed by the mayor of an incorporated town rather than by the circuit court clerk, the adoption was invalid. In re Williamson's Estate, 205 Ia. 772, 218 N.W. 469. The recording must be done while the child is a minor. McCollister v. Yard, 90 Ia. 621, 57 N.W. 447. A mere contract to adopt is



not sufficient to make the child a legal heir of the adoptive parent but the contract is valid and enforceable against the adoptive parent. Caulfield v. Noonan, 229 Ia. 955, 295 N.W. 466. In view of the Iowa statutes and decisions existing at the time, we agree with appellees that Donald Merrill Glancy was never legally adopted by Leslie M. Glancy.

Holding as we do that Donald Merrill Glancy is not a legally adopted child of Leslie M. Glancy, it is clear that he could not be considered a grandchild or "issue" of the settlor, Merrill C. Glancy, and equally clear that he would not be entitled to share in the income or corpus of the trust. For this reason there is no necessity to discuss the trust provisions.

For the reasons given the judgment is affirmed.

AFFIRMED.

MURPHY AND KILEY, JJ., CONCUR.

ABSTRACT ONLY.

The plaintiff, a 27-year old resident of Collinsville, Illinois, at the time of this occurrence, was working in St. Louis and attending night school to secure a college degree. While passing the defendant's place of business in Collinsville on April 25, 1957, he observed a Mercury

convertible on the used-car lot. He stopped and examined it and observed a tag on the ignition key which read, " '56 Merc. Conv. Color: Tur." Plaintiff testified that he was then driving a '54 Mercury hard-top with 70,000 miles on it; that the convertible had about 2,000 miles on it and was equipped with automatic transmission, power brakes, power steering, radio and heater; that he was told in effect by the salesman several times that the convertible was a '56; that the convertible was priced at \$2,125.00 and defendant originally required \$1,125.00 cash, plus the '54 to make the deal; that after some bargaining he ultimately paid \$1,050.00 plus his '54 for the convertible under the impression that it was, in fact, a '56; that he first learned that it was a '55 when his insurance agent called his attention to that fact from the information on the bill of sale; that he thereupon immediately called the defendant and when it was confirmed that the convertible was a '55, attempted to rescind the sale; that a lawyer accompanied him to defendant's place of business the same day and attempted to effect a rescission but that defendant refused saying, "A deal is a deal." The owner of defendant testified as an adverse witness for plaintiff that the average difference in retail value of a '56 and '55 convertible would be \$620.00. This is the substance of plaintiff's case.

Five witnesses testified on defendant's behalf. The salesman who dealt with plaintiff denied having told him that the convertible was a '56 or having referred to it as such, and stated he told plaintiff it was a '55. He identified an exhibit purporting to be a routine record

made by him in the course of business covering the transaction in which the '54 Mercury is described as "Rough, 70,000 miles," and the convertible is described as a '55; additional exhibits were identified, down-payment receipt, application for title and application for transfer of registration, all of which described the convertible as a '55. The latter two exhibits were signed by plaintiff in blank. Another witness testified that he had been interested in the convertible plaintiff bought and that it was gray and blue two-toned, and that '55 and '56 Mercurys were hard to distinguish. An odd-jobs employee of defendant testified he talked to plaintiff when he first examined the convertible and told him it was a '55; that plaintiff said it was a '56 but that he corrected him and said the tag said '56 but it was a '55. Another witness, who was a customer of defendant testified as to a conversation with plaintiff in which the witness referred to the convertible as a '55 and commented on the advisability of buying a '55 instead of a '56 because they were so similar. Mr. Birger, the owner of defendant, stated that he had no conversation with plaintiff as to the year or model of the convertible. The following comparative figures from the Automobile Association Dealer's Book were also developed by the owner's testimony; that the retail value of an average 1955 Mercury convertible equipped as was the car in question was \$2,105.00, but that the car was better than average; that the average wholesale value of the '54 Mercury was \$1,080.00 but that since the '54 was in "rough" condition, it was actually

wholesaled at \$915.00; that the average retail value of a '56 Mercury convertible similarly equipped was \$2,725.00; that the convertible had been taken in trade ten days earlier at a figure of \$2,676.50.

Plaintiff's case rests solely on his testimony as to the tag on the key ring, the alleged statements of the salesman, and inferences to be drawn from his immediate effort to rescind the transaction when the Insurance agent saw from the bill of sale that the convertible was a '55. Against this, defendant presents the denial of the salesman that it was referred to as a '56 and the testimony of three others, only one of whom was an employee, that the car was described as a '55 in conversations with plaintiff. Coupled with this is documentary evidence clearly listing the convertible as a '55 which was turned over to plaintiff. There are also inferences to be drawn from the testimony of the values of the automobiles involved. Adding to plaintiff's \$1,050.00 cash payment the \$915.00 proceeds of the sale of the '54 to a wholesale dealer, we see that defendant ultimately received \$1,965.00 for the '55 convertible, or an amount about midway between the average retail value and the average wholesale value of a '55 convertible. And, giving some credence to the testimony that the car would be classified at higher than average retail value because of its low mileage, it is obvious that plaintiff was scarcely defrauded in a monetary sense. He may not have reaped the bargain he thought he had, but the true transaction closely conformed to actual values involved. He traded in a '54, which, with 70,000 miles on it, could

at best classify only as average wholesale with a value of \$1,080.00. This valuation coupled with his cash payment is still almost \$600.00 short of the average retail value of a '56 convertible and just \$25.00 more than the retail book value of the average '55 convertible. When these computations are considered against the backdrop of the testimony, we can reach no other conclusion but that the jury's verdict was contrary to the manifest weight of the evidence. It is true that plaintiff's conduct supports his contention that he believed that he was buying a '56 model and we can assume that such was the case. But, we find the evidentiary basis for such belief slim, indeed. The key-ring tag referred to a car of another color and can scarcely be given the weight that attaches to the bill of sale; plaintiff's testimony of the oral representations were contradicted by the salesman; and two witnesses with only friendship or a relationship as customers to spur them testified contrary to the plaintiff. Such evidence, far from making out a case of fraud, is insufficient to support the verdict when weighed against the contrary evidence.

We therefore conclude that the verdicts should be reversed as against the manifest weight of the evidence and the cause remanded for a new trial.

Reversed and remanded for new trial.

Culbertson, J., and Scheineman, J., concur.

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JAN 21 1959

James R. McLaughlin
CLERK OF COURT
FOURTH DISTRICT, ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1958

Term No. 58-0-5

Agenda No. 2.

NORMAN ACCEPTANCE COMPANY,)
a Corporation,)
Plaintiff, Plaintiff-Appellant,)
vs.)
L.T. GUFFEY AND ETTA GUFFEY,)
Defendants, Defendants-Appellees.)

20 I.A. 309^{2d}

Appeal from the
Circuit Court of
Hamilton County,
Illinois.

CULBERTSON, J.

NORMAN ACCEPTANCE COMPANY, as plaintiff, brought an action as against L.T. Guffey and ETTA GUFFEY, to recover the amounts of certain notes held by Norman Acceptance Company. In the answer to the complaint the defendants alleged that the plaintiff was not a holder in due course, and further, that even if it was a holder in due course it was subject to the same defenses available as against the original payee and endorser, Little Egypt Food Plan, because the notes

were secured through fraud and circumvention. Defendants also filed a counterclaim against plaintiff for damages sustained by reason of such fraud and actions of plaintiff against defendants. The cause was tried before a jury which returned a verdict in favor of defendants on their counterclaim as against plaintiff, assessing the sum of \$500.00 for their damages. Judgment was entered on such verdict and an appeal is taken to this Court from such judgment.

On appeal in this Court the plaintiff, Norman Acceptance Company, contends that plaintiff was a bona fide purchaser for value and that if a fraud had been practiced upon defendants by the payee in the securing of the notes, it was not such fraud as would void a negotiable instrument in the hands of plaintiff. It is also contended by plaintiff that the introduction in evidence over plaintiff's objection, of an indictment by the Grand Jury of the original payee of the notes for false pretenses in the securing of said note, was improper and prejudicial, and that if such admission

was proper, defendants are bound by recitations contained in the indictment, presumably to the effect that the notes were two negotiable promissory notes.

The evidence disclosed that the plaintiff, Norman Acceptance Company, had furnished forms for use of the Food Plan seller, a one Eugene Woolsey. Woolsey, and a companion, called at the home of defendants and after making certain representations, induced them to make out a tentative order, stating that the document would be returned for their inspection. The document was never returned, and the next time it appeared it was in the possession of plaintiff with the conditional sales part filled in showing the purchase of a freezer, with the cash price specified, showing a down payment, carrying charges, and various monthly installments to be paid. The blank note part was filled in to correspond with the conditional sales contract, and a wage assignment part was also filled in. Action had been filed on the notes in the Municipal Court of the City of Chicago, but the judgment was later vacated for want of jurisdiction

since the defendants lived in Hamilton County.

Under the evidence in the record it was apparent that only the indictment was presented to the jury. We are unable to go outside the record, as suggested by Appellees' brief, into an inquiry as to whether or not any further evidence was offered as to the disposition of that criminal proceedings. It is apparent that an indictment alone can hardly be conclusive since many innocent men have been subject to indictment. It would be setting an improper precedent to permit the introduction of an indictment to stand as support for a presumed fraud. While we are expressing no opinion upon the eventual disposition of the issues, we must, under the circumstances, remand this case for a new trial for the reason that the admission of the indictment over the objection of plaintiff was clearly reversible error.

Under the record before us, therefore, the judgment of the Circuit Court of

Hamilton County should be reversed
and the cause remanded for a new trial.

Reversed and remanded.

Bardens, P. J., Scheineman, J., concur.

Publish abstract only.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1958

Term No. 58-0-11

Agenda No. 4

V. D. S. CORPORATION, a Corporation,

Plaintiff-Appellee,

vs.

ALTON BANKING & TRUST COMPANY, a Corporation,

Defendant-Appellant.

201A 209
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Appeal to the
Appellate Court
of Illinois,
Fourth District,
from the Circuit
Court of Madison
County, Illinois.

CULBERTSON, J.

This action was brought to recover damages from defendant Bank for breach of contract in honoring five allegedly forged checks and charging them to the checking account of plaintiff in the defendant Bank. The five checks on their face totaled \$8,000.00. Plaintiff proved a loss of \$7371.73. The case was tried by the Court, without a jury, and judgment was entered in the sum of \$7371.73.

The record sustains the contention of plaintiff that the checks were forged checks. It is unnecessary to review in detail the

1. The first part of the report

2. The second part of the report

3. The third part of the report

4. The fourth part of the report

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11. The eleventh part of the report

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13. The thirteenth part of the report

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16. The sixteenth part of the report

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facts in the case. There was a contention by the defendant that the plaintiff was precluded by its own neglect, from setting up the forgeries. While a contention is made on appeal that the finding that the checks were forgeries was against the manifest weight of the evidence, the record very clearly establishes that such checks were, in fact, forgeries, and that they totaled \$8,000.00 in all.

The defendant also contends the Court erred, as a matter of law, in entering the amount of the judgment, and that if the checks were forgeries, the judgment should have been for \$8,000.00 rather than \$7371.73. The record shows the total amount of the loss on the checks was \$7371.73, and it is obvious that plaintiff was entitled only to recover the amount of the loss actually proven, even though the checks actually exceeded the amount of the loss. Part of the amount had been recovered and the judgment of \$7371.73 was the proper amount to be entered under the circumstances.

58011 (3)

Findings of a Court in trials without a jury, are entitled to the same weight as a jury verdict and will not be set aside unless manifestly against the weight of the evidence (COMPTON vs. SCHOOL DIRECTORS OF DISTRICT NO.14, 8 Ill. App. 2d. 243, 263; JAMES G. COONEY vs. CITY OF BELLEVILLE, ILLINOIS, 311 Ill. App. 553, 561).

The conclusion of the Trial Court, being supported by ample evidence as appears in the record, is not manifestly against the weight of the evidence and must, therefore, be affirmed. The judgment of the Trial Court of Madison County will, therefore, be affirmed.

Affirmed.

Bardens, P.J., and Scheineman, J., concur.

Publish abstract only.

October Term, A. D. 1958

Term No. 58-0-18

Agenda No. 7

FORD MOTOR COMPANY,)
)
 Counterclaimant-Appellant,)
)
 vs.)
)
 CARLOS KENDALL,)
)
 Counterdefendant-Appellee,)
)
 and)
)
 CARL HERRMANN,)
)
 Crossdefendant-Appellee.)

Appeal from the
Circuit Court of
St. Clair County,
Illinois.

20 JAN 24 1960

CULBERTSON, J.

This is an appeal from a judgment of the Circuit Court of St. Clair County based upon the verdict of a jury in a counterclaim asserted by FORD MOTOR COMPANY as counterclaimant, against CARLOS KENDALL and CARL HERRMANN, as counterdefendants. It was contended that the negligence of Kendall who was the original plaintiff in the suit, and of the defendant Herrmann, caused

the damages resulting from the accident in which Ford Motor Company was also a defendant. The automobile of Ford Motor Company was driven by an agent of the Ford Motor Company at the time of the accident. The jury returned verdicts of not guilty for both Kendall and Herrmann.

It is the theory of Ford Motor Company on appeal in this Court that the verdicts of the jury were against the manifest weight of the evidence and based on bias and prejudice, and that the Trial Judge should have set aside the verdicts and allowed a new trial on the crossclaim and counterclaim.

In the case before us the evidence discloses that the Ford Motor Company car was being driven by an individual who stated that he saw the other two cars involved in the accident but did not know whether or not he applied his brakes in approaching the scene of the accident when he saw the Herrmann car weaving and skidding sideways and the Kendall car about 100 feet ahead of him. He saw the Kendall

car move to the right shoulder and he went to the left in an effort to pass east of the Herrmann car. The Kendall car turned left coming back onto the road and the accident occurred. The Ford Motor Company car stopped five or six feet north of the Herrmann car. The facts may have been essentially undisputed but the interpretation of these facts into a verdict is essentially a question for the jury. The Trial Court was not justified in substituting its judgment on these facts for that of the Jury simply because the Court might have come to another conclusion. The question of negligence and contributory negligence on part of the Ford Motor Company was a question of fact for the jury and was determined as a question of fact by the jury. Under the record before us we cannot say that such verdict was contrary to the manifest weight of the evidence.

It is also contended by the Ford Motor Company that there was a variation in the assessment of damages, that is, \$800.00 as against Herrmann and \$1700.00 as against the Ford Motor

Company, and that this constituted a bias or prejudice. Both Herrmann and Ford Motor Company were found guilty by the jury and respective verdicts returned as to such defendants. A new trial was awarded on these verdicts but on the basis of the testimony before the Court, the Court denied a new trial on the verdicts against Ford Motor Company on its counterclaim, presumably on the basis that there was evidence of contributory negligence from which the jury could conclude that Ford Motor Company had no right to recover.

The plaintiff could have selected one of the joint tort-feasors and taken judgment as against such tort-feasor and dismissed as against the others and that would have cured irregularities in verdicts with respect to the damages (KOLTZ, ET AL. vs. JAHASKE, ET AL., 312 Ill. App. 623). The selection of the particular verdict could have been made by the plaintiff and judgment could have been entered on that verdict and the other parties thereafter would not

have been in a position to complain
(ALDRIDGE vs. FCX, 348 Ill. App. 96).

In the instant case the jury had been dismissed prior to the opening of a sealed verdict and for reasons which were apparently sound, the Court ordered a new trial as to such verdicts, but correctly denied a new trial on the verdict on the counterclaim and cross-claim. The evidence before the Court was such as to justify such verdict on the basis of contributory negligence on part of Ford Motor Company's driver.

The fact that the jury, in apparent confusion, improperly felt that the verdicts as against the Ford Motor Company and Herrmann should be proportionate to the negligence of each party, did not justify a conclusion that such verdicts resulted from bias or prejudice, and certainly furnish no basis for setting aside the verdict on the counterclaim and crossclaim by this Court.

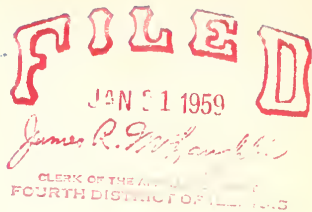
The judgment of the Circuit Court of St. Clair County will, therefore, be affirmed.

Affirmed.

BARDENS, P. J., and SCHEINEMAN, J., concur.
Publish abstract only.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT



October Term, A. D. 1958

Term No. 58-0-20

Agenda No. 10

LEON JORDAN,)	
Plaintiff-Appellant,)	Appeal from the
)	Circuit Court of
vs.)	Wayne County,
)	Illinois.
JACK FEARN,)	
Defendant-Appellee.)	

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CULBERTSON, J.

This is an appeal from a judgment of the Circuit Court of Wayne County entered on a jury verdict for the sum of \$5,000.00. It is contended on appeal in this Court that the judgment is grossly insufficient and inadequate in view of the injuries and damages sustained, and that a new trial as to amount of damages only should be granted by reason of such inadequate verdict.

The record shows that Leon Jordan, who was injured in an automobile accident, instituted action for damages as against defendant, Jack Fearn, with a co-plaintiff named Clarence Talkington. The jury returned a verdict in favor of Clarence Talkington for \$7500.00,

and in favor of Leon Jordan for \$5,000.00. Jordan alone filed a post-trial motion for new trial, which was overruled by the Trial Judge, and Jordan alone is the Appellant seeking a new trial solely on the question of damages.

We shall not review the facts of the accident, but should briefly state that the total special damages shown as to the plaintiff were \$3,554.10. There was conflicting evidence as to whether plaintiff did or did not suffer an intervertebral disc injury.

We have frequently held that the amount of damages is purely a question for the jury where the verdict is within reasonable scope of the evidence (ISLEY vs. McCLANDISH, 229 Ill. App. 564, 568). If, however, under the evidence damages are clearly proven and a jury returns a verdict which is clearly inadequate, a motion for new trial on such ground should be sustained by the Trial Court (MONTGOMERY vs. SIMON, 309 Ill. App. 516).

Under the record before us the question of liability was disputed and there was a dispute of fact on the medical evidence before the Court. Courts are very slow to interfere with the judgment of a jury in matters relating to damages, and while we might disagree with the amount as found by the jury, before a Court would be authorized to set aside a verdict and judgment entered pursuant thereto, a conclusion must be reached that the verdict is so grossly unfair

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and unreasonable that the jury must be said to have been acting from passion or prejudice, or other motive, or been clearly wrong on any reasonable interpretation of the facts in evidence.

The jury in the present case returned a verdict of \$5,000.00 for the plaintiff. The damages to the automobile of plaintiff were \$1127.00, and \$2427.00 in medical expenses were shown. There was no evidence of loss of earnings in the past, or loss of anticipated earnings. We cannot arbitrarily substitute our judgment for that of the jury. We must therefore conclude, under the facts in the record and established precedents in this State, that the action of the Trial Court was proper and that the verdict of the jury should not be set aside.

It is contended on this appeal that the limitation of voir dire examination of jurors to show interest in Country Mutual Casualty Company, as shown by the record in this case, constitutes reversible error. With this contention we do not agree. Similarly, there was no reversible error in the use of a discovery deposition, or interrogation of the treating physician as to his diagnosis on cross examination in the course of the trial, nor do we find any reversible error in the instructions.

We were most concerned, however, by the matters relating to argument of counsel for defendant in the case. Statements were made by defendant's

Counsel which were clearly improper. Had this case resulted otherwise, we might have been compelled to attach greater significance to such improper arguments. Under the circumstances we do not believe the matters contained in such arguments constituted reversible error.

The judgment of the Circuit Court of Wayne County will, therefore, be affirmed.

Affirmed.

Bardens, P. J., and Scheineman, J., concur.

Publish abstract only.

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FILED
JAN 21 1959

James R. McLaughlin
CLERK OF THE COURT
FOURTH DISTRICT, ILL.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1958

20 1A. 311^{2d}

Term No. 58-0-31

Agenda No. 1

HENDERSON JACKSON, WILLIAM HUDGINS)	
JESSE LAWRENCE, WILLIAM MALLORY,))	
WILLIAM JEFFERSON, RAZZ HARRIS,)	
DEE GORDON, ARCHIE O. BROWN,)	
Individually, as Members of Mount)	
Moriah Missionary Baptist Church)	
of Cairo, Illinois, a Religious)	
Corporation, and as the Majority)	Appeal from
of the Members of the Board of)	the Circuit
Deacons of the Mount Moriah)	Court of
Missionary Baptist Church of)	Alexander
Cairo, Illinois, a Religious)	County,
Corporation,)	Illinois.
)	
Plaintiffs,)	
)	
vs.)	
)	
A. G. GREAGCRY,)	
)	
Defendant.)	

CULBERTSON, J.

An action was instituted by the
Plaintiffs, individually and as a majority of
the Board of Deacons of Mount Moriah Mission-
ary Baptist Church of Cairo, and as members
of the Church, for an immediate injunction without

notice against the Pastor of the Church to restrain him from doing any act as Pastor and from promoting discord within the Church.

Exhibits were attached showing the resignation of the Pastor, as hereinafter set forth, and upon posting of a bond the injunction was issued without notice. Defendant thereafter filed a motion to dissolve the injunction. Such motion was denied. The present appeal is taken from the denial of the motion to dissolve the injunction under Section 78 of Chapter 110, Illinois Revised Statutes (1957 ILLINOIS REVISED STATUTES, Chapter 110, Section 78).

The petition which was filed in this case recited that the defendant had tendered his resignation to the Church. Such resignation recited, among other things, "I am hereby tendering my resignation as Pastor of this Church. The termination of my pastorate will take effect, date will be announced tomorrow night, May 26, 1958." The petition then alleges that the resigna-

tion was accepted and the exhibit attached to the petition shows that the resignation was read and received, and notes that the vote was carried. The petition then goes on to state that although the connection of the Pastor with the Church was severed on May 26, 1958, the defendant continued to usurp the rights, powers, and duties as Pastor, by holding meetings and calling meetings, etc., and it was then alleged that the acts of the Pastor were promoting discord, intolerance and enmity between the members of the Church and that unless restrained the Church itself would be seriously injured and damaged; that the damage would be irreparable; that no adequate remedy at law exists; and that because of the actions of the defendant Pastor and the threat of continuation of the action, the goodwill, peace, and proper conduct of the Church would be unduly prejudiced unless an injunction issued immediately and without notice.

It is contended on appeal in this Court that the Court should keep in mind

that this is a religious organization, in which peace, good-will, and proper conduct of temporal as well as religious conduct of the Church, are not subject to evaluation in dollars and cents; that these are matters of immediate concern to all the members of the Church and should be corrected immediately and that delay would permit defendant to widen the damage to such proper conduct of the Church. The Church Board concedes that the issuance of a temporary injunction without notice, is a drastic remedy, but contends that the situation is so drastic that the issuance of such injunction was necessary to preserve the status quo.

We have examined the petition as presented in the Court below and the accompanying exhibits, and are unable to determine how the rights of petitioners would have been unduly prejudiced by giving notice of the application for injunction as required by the statutes (1957 ILLINOIS REVISED STATUTES, Chapter 69, Section 3.) We have emphasized in a

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know if the study was successful in achieving its goals and if the data collected is reliable and valid. They also want to know if the study has contributed to the field of research and if it has provided any new insights or findings.

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previous case that the extraordinary character of an injunctive remedy, without notice, requires that it be awarded only where the complaint shows on its face a clear right to relief and that the giving of notice would unduly prejudice the rights of petitioners (STENZEL vs. YATES, 342 Ill. App. 435). The Courts have pointed out repeatedly that circumstances must be extraordinary to justify the granting of an injunction without notice to the opposing party, and that one of the most fundamental concepts of justice is that judicial authority should not be authorized over the person or property of another without notice. Whenever a Court is in doubt as to the justification of the issuance of an injunction, without notice, as being essential to the preservation of the Statutes or rights of parties, notice should be given (SKARPINSKI vs VETERANS OF FOREIGN WARS, 343 Ill. App. 271).

Under the facts in the record, what justification was there for omitting the notice to the Pastor? The brief period involved between the time

of filing the petition and a hearing following notice, obviously would produce less potential disruption than the litigation itself. While we make no observations as to the eventual disposition of this cause, we cannot underwrite the granting of an injunction without notice, under the facts in the record. The allegations of acts which were wrongful or statements of conclusions to the effect that there would be irreparable injury if notice were given were not of themselves justification for the issuance of an injunction without notice, but facts showing why such notice should be omitted should be clearly set forth and readily perceptible.

We must therefore conclude under the record that there was no justification for the issuance of the injunction without notice and the cause will, therefore, be reversed and remanded to the Circuit Court of Alexander County, with directions to

58031 (7)

proceed further in accordance with
the views expressed in this opinion.

Reversed and remanded.

Bardens, P.J., and Scheineman, J., concur.

Publish abstract only.

47527

VERA SAXON,

Appellee,

v.

MICHAEL R. SAXON,

Appellant.

20 I.A.²⁴ 477

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION
OF THE COURT.

Defendant appeals from two orders entered in a divorce suit—one increasing child support from \$150 to \$250 per month, and the other allowing attorney's fees in the amount of \$750.

The parties were divorced in 1945. At that time defendant was ordered to pay \$100 per month for the support of both children. In 1955 that was changed by stipulation to \$300 per month. In 1958 the older child reached her majority and a petition was filed for an increase of support for the younger child and for certain orders with respect to life insurance required by a previous order to be carried and paid for by defendant. The petition was based on the two essentials for such a modification—change in the needs of the child, and an increase in the income of the father. A third material element is any change in the financial condition of the mother. The care of a child is a joint responsibility.

An answer was filed denying the averments of the petition. The answer neither affirmed nor denied the allegations with respect to the earnings of the father. Such an

answer is no better than an admission or no answer at all when, as here, the defendant knows the facts. We therefore accept the allegations of the petition with respect to the defendant's earnings. However, on the other point made—the needs of the child—defendant was entitled to a hearing. That includes the right to have witnesses appear and be cross-examined. Lenard v. Lenard, 348 Ill. App. 392; Goodman v. Goodman, 329 Ill. App. 444. Defendant asked the court to have the parties sworn and testify. The court did not do so.

We are fully cognizant of the overwhelming pressure to which a most conscientious judge is subjected in the hearing of motions such as these, and we can well understand the confusion that would follow if the hundreds upon hundreds of such motions in divorce cases were each to receive a formal hearing. Yet, until another legal method for the disposition of these matters is found and provided for by legislation, the courts must provide a hearing when it is requested. This is fundamental.

The orders must be reversed and the cause remanded for further proceedings not inconsistent with the views here expressed.

Orders reversed and cause
remanded.

McCormick, P. J., and Dempsey, J., concur.

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47624

VERA SAXON,

Appellee,

v.

MICHAEL R. SAXON,

Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

20 I.A. 478

MR. JUSTICE SCHWARTZ DELIVERED THE
OPINION OF THE COURT.

This is a companion case to No. 47527, which was an appeal from orders increasing child support and allowing attorney's fees in connection with that proceeding. We reversed the orders and remanded the cause for the reasons stated in the opinion.

In the instant case, after the appeal was taken in No. 47527, plaintiff asked for attorney's fees to defend against the appeal. The court allowed her \$500. The only question is whether the court abused its discretion.

The matter was submitted on petition and answer. No witnesses were sworn and no evidence was heard. A heated argument full of personalities and minatory implications took place. Defendant did not suggest, as in No. 47527, that witnesses should be called. The court took the matter under advisement, and arrived at the conclusion that defendant should pay a fair fee for legal services required to defend the appeal in No. 47527. No evidence was heard

-2-

on what would be a reasonable fee for such services. It was not necessary. A judge is qualified in such a case to reach a conclusion based on his own experience. We cannot say that the court went beyond the bounds of discretion in fixing a fee of \$500.

Order affirmed.

McCormick, P. J., and Dempsey, J., concur.

ALFRED SZEBEL.

Petitioner-Appellee,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent-Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On April 25, 1958, Alfred Szebel was found guilty of possession of obscene pictures and placed on probation for two years, the first 15 days thereof to be served in the common jail of Cook County. On June 20, 1958 he filed a petition in the nature of a writ of error coram nobis, praying that the judgment be vacated and that he be acquitted or granted a new trial. On that day the court denied the People's motion to strike the petition, vacated the judgment and ordered a new trial. The People, appealing, ask that the order of June 20, 1958, be reversed. No brief has been filed for the defendant.

Since the proceeding to vacate the judgment brought under Section 72 of the Civil Practice Act is civil in its nature, the People have a right to review the judgment. See People v. McArthur, 283 Ill. App. 467; People v. Green, 355 Ill. 468, 475; and People v. Ehler, 353 Ill. 595, 599. The petition fails to allege what facts or evidence were unknown and unavailable to the defendant at the time of the trial. There is no showing that the absence of any evidence at the

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trial was due to fraud, duress or excusable mistake. The petition fails to state any ground for relief. The court's action in setting aside the judgment and ordering a new trial was erroneous.

Therefore the order of June 20, 1958, is reversed and the cause is remanded with directions to reinstate the judgment of April 25, 1958.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, P. J., and BRYANT, J., CONCUR.

201.A.4.79²

Agenda 22

Appeal from
Circuit Court
Sangamon County

This is an appeal from a judgment entered on a directed verdict for the defendant at the close of plaintiff's evidence and from the court's denial of plaintiff's motion for leave to amend his complaint. On August 18, 1955, plaintiff, while employed by the defendant, sustained an injury to his heel. It is conceded by both parties that the parties were not within the provisions of the Workman's Compensation Act. Defendant was the owner and operator of a florist shop and hired plaintiff to work a few hours each day doing general manual labor. Plaintiff had full-time employment elsewhere. In his business, defendant maintained a two story barn adjacent to the greenhouse, where he had stored for the past thirty or forty years all sorts of items used in his business. These items included boxes, wire basket holders, pieces of lumber, barrels and the like.

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George Sirtout, another employee of the defendant, were cleaning out the barn. The defendant and Sirtout worked in the barn and plaintiff outside of the barn on and with a truck owned by defendant and used to haul the trash away. The parties cleaned out the first floor of the barn with defendant and Sirtout handing the items in the barn to plaintiff who threw them onto the truck or placed them in the alley. The defendant determined which items were to be disposed of and which were to be saved, and those saved were placed in the alley. The truck had a flat bed with a six inch board side and a tailgate some 1 1/2 feet in width. It was parked next to the doorway of the barn in an alley lying to the West of the barn so that the tailgate was at the South end of the doorway. Certain items were placed by the plaintiff in the alley, including a barrel and wire basket holders. This was done at defendant's directions, although plaintiff was not specifically advised where they were to be placed, apparently anywhere except in the truck. The record is not clear but apparently the defendant and Sirtout also placed items in the alley or threw them on the truck. When the first floor was clear the defendant directed plaintiff to haul the trash away and he and Sirtout went up to the second floor of the barn to commence cleaning that out.

When plaintiff returned he backed the truck into position under the opening of the loft. The left side of the truck was parked as close to the side of the barn as possible. Plaintiff

George Hinton, another employee of the defendant, was observed
and the defendant. The defendant and Hinton arrived in New York and
Hinton's statement of the facts was that a truck was used
before and was to haul the truck away. The parties observed
that the first floor of the house with defendant and Hinton went
the issue in the house is actually the same - that with the truck
to be used from the office. The defendant testified that the
were to be furnished at all times for the party, and that
several were placed in the house. The truck and a flat bed truck
six truck went along and a telephone line is that in 1911. In the
parked near the doorway of the house in an alley. In the
West of the party he had the telephone set in the house and it was
journey. The first floor was placed in the house in the alley,
including a party and the party's mother. The wife took of
defendant's statement, although Hinton's was not specifically
obtained there but was to be placed, especially in the house
in the house. The record is not clear but apparently the
defendant and Hinton also placed them in the office in three
times on the truck. When the first floor was placed in the defendant
attached Hinton to haul the truck away and he was observed
went up to the second floor of the house to examine cleaning
that off.

When Hinton's statement was made the truck was parked
under the opening of the first. The first floor of the truck was
parked as close to the side of the house as possible. Hinton

could not see clearly how to park and was directed in parking the truck by the defendant. The truck was stopped with the tailgate against the barrel and other items in the alley that had been removed from the first floor. The bottom of the opening on the second floor from where the trash was to be removed was some 12 feet above the ground and plaintiff testified he could not quite reach it while standing on the bed of the truck. Defendant and Stirtout proceeded to clear the debris from the loft and defendant again would tell them that which was to be saved and that which was to be discarded. There were numerous pasteboard boxes about 1' x 2' x 8" in size stored in the second floor and some of these boxes contained wasps and nests. Defendant admits he knew the presence of the wasps and testified that they made nests in the boxes. He further testified they were common around the greenhouse and that they seldom stung anyone unless "you cornered them and beat them". That in the 51 years he worked around a greenhouse he had been stung only once. He further testified that he did not notify plaintiff of the presence of the wasps nor of their propensities. It is agreed that there were no wasps found while cleaning out the first floor.

Plaintiff testified he did not see the wasps nor know of their presence until the incident leading to his injury. Defendant's testimony is that he had "passed down" to the truck quite a few of the boxes containing wasps. During this phase of the job plaintiff would stand on the bed of the truck and

defendant and Sirtout would remove articles from the loft, bring them to the opening of the barn and there they would be disposed of, either by putting them in the alley or on the truck. It is not clear how full the truck was loaded at the time of the incident. Suffice to say that it was one-half to three-quarters full. Plaintiff was standing on the bed of the truck at the rear, placing one of the items received from the loft in the alley. None of the three parties involved could say who handed him this item. After he had placed it in the alley he turned around and at that instant one of the pasteboard boxes landed at his feet. A number of wasps flew out of the box into his face. He threw his hands to his face and commenced fighting the wasps off and at the same time stepped backwards. His foot left the truck and came to rest on the edge of the barrel in the alley and he started to fall on the debris. Fearful that he would fall and be pierced by the rods, wires and other matter he pushed himself clear and landed beyond the debris and thus sustained a fracture of the heel bone.

Plaintiff did not know who, if anyone, threw the box at his feet. The defendant denied doing this and further denied ever throwing anything into the truck from the loft while plaintiff was standing on the truck. Sirtout also denied throwing the box in question and stated he did not see whether the defendant had thrown it or not. In his answer to the complaint defendant admitted that either he or his employee threw the box but contends

now that this admission is not that he threw the box in question but that he did throw a box at some time or other. This contention is without merit for his answer purports to answer a specific paragraph of the complaint and reading the two together there is no other reasonable conclusion to be drawn from the answer. To further complicate this somewhat vital point, defendant's testimony taken at a deposition was introduced in evidence. In that deposition he admitted throwing this box into the truck and in explaining the discrepancy, claimed he misunderstood the question at the deposition and meant only that he had thrown boxes when the plaintiff was not in the truck.

Plaintiff filed his complaint in two counts, the first alleging defendant's negligence as an employer in failing to provide plaintiff with a reasonably safe place to work. On motion made before trial, Count 1 was dismissed. Count 2 of the complaint alleged in substance that defendant (a) negligently failed to properly inspect the boxes when he knew the likelihood of wasps being in them, (b) negligently failed to warn the plaintiff of this condition, (c) negligently threw boxes into the truck without warning the plaintiff and when plaintiff was not looking, (d) negligently directed plaintiff to work in a truck that was overloaded and stand on the tailgate under a hazardous condition and then threw boxes directly on the truck without warning plaintiff, (e) negligently threw a box containing wasps directly in front of plaintiff, and (h) permitted his employee, meaning

Sirtout, to act as alleged in (g). Paragraphs (g) and (h) of the above complaint were added by amendment after the trial. Plaintiff's motion to strike Paragraphs (a) through (e), filed before trial, was denied. Plaintiff also endeavored to amend the complaint by adding thereto Paragraph (f) alleging once again that the defendant had failed to provide plaintiff with a safe place in which to work, and the lower court refused to allow such amendment. On motion made by the defendant the court directed a verdict in his favor and from this order and the order refusing to allow the complaint to be amended by Paragraph (f), plaintiff appeals.

We are therefore confronted on this appeal with the question of whether there is any competent evidence, standing alone, together with any reasonable inferences to be drawn therefrom, taken with its intendments most favorable to the plaintiffs, to support the foregoing charges of negligence.

Plaintiff contends in substance that the lower court erred in directing a verdict because (1) there was evidence to support his cause of action and (2) plaintiff was not guilty of contributory negligence as a matter of law. Defendant counters plaintiff's first contention by insisting that there was no evidence proving negligence on his part or that, that negligence, if proven was the proximate cause of plaintiff's injury.

The facts are clear that plaintiff did not know of the presence of the wasps; that when they fell at his feet he was startled; that he fought them off as they flew into his face and simultaneously stepped back; that he was at the time at the very

rear of the truck and that with this step he stepped off the truck; that Sirtout did not throw the box into the truck; that the defendant had thrown boxes containing wasps into the truck prior to the box in question and that the defendant knew of the presence of the wasps and neither told plaintiff of their presence nor of their propensities. It is also clear that the wasps in question would sting if they were fought, and plaintiff fought them.

It must also be considered that the defendant, in his answer, admitted throwing the box. His testimony denying that he threw the box did not conclusively establish that as a fact, but merely raised a question of fact for the jury, particularly in the light of the conflicting testimony given at the deposition. Plaintiff testified that defendant had on numerous occasions thrown items into the truck while he was standing on the bed. It must also be remembered that the defendant admitted that he "passed" boxes containing wasps into the truck prior to this incident. Under the foregoing, the question of whether defendant threw the box or caused it to fall at plaintiff's feet and whether in so doing he, the defendant, was negligent was a fact question for the jury.

Likewise the question of whether defendant's act, if he did so act, was the proximate cause of plaintiff's injury, was a fact question for the jury. The courts of Illinois have repeatedly said that to constitute proximate cause, a negligent act or omission need not be the sole cause. If the negligent act or omission is an efficient cause, such act or omission is actionable, even though other causes, not attributable to plaintiff, combined with

such negligence to produce the ultimate result. Such concurrent causes may be the acts of a third person, either wrongful or innocent, or some accidental, inanimate or natural force or an act of God, or some combination thereof, but whatever their nature in this respect, they will not relieve a defendant from liability if his negligence is one of the efficient causes of the injury or at least an efficient cause without which the injury would not have occurred. Hence, the wrongful author of any efficient cause is liable as though it were the sole cause. The negligence is actionable if it is a direct contributing cause, or if it contributes directly to producing the harm. If the harm is a natural, probable and foreseeable consequence of the first act or omission, the original wrongdoer is liable, notwithstanding other causes, conditions or agencies intervened between his negligence and the ultimate result. Natural and probable consequences are those which human foresight can anticipate. It may be said that proximate cause is simply a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue. Chapman v. Baltimore & Ohio R. Co., 340 Ill. App. 475.

Defendant contends that plaintiff assumed the risk of known dangers or such as are so obvious that knowledge is to be fairly presumed. We recently had occasion to consider the doctrine of assumed risk in Stone v. Guthrie, 14 Ill. App. 2d 137, 144 N.E. 2d 165. It was there pointed out that the law does not recognize

such application to include the rights of the

member and on the basis of a third party, either

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the master's negligence as being an ordinary and usual risk incident to the employment. Where the personal negligence of the master has caused the injury, the master's liability to the servant is the same as it would be to one not a servant. The master is liable where the servant is injured by a temporary peril to which he is exposed by the positive negligent act of the master. Fairbanks v. Haentzsch, 73 Ill. 236; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 44 N.E. 876; Illinois Central R. R. Co. v. Swift, 213 Ill. 307, 72 N.E. 737.

Defendant contends that the plaintiff, in stepping back and off the truck, was negligent as a matter of law. He was at the time in a position where a false step would cause him harm and he did make the false step. It must be remembered, however, that persons who have to act in a sudden emergency are not to be judged in the light of after events but are to be judged under all the circumstances of the case by the standard of what a prudent person would have been likely to do under the same circumstances. Barnes v. Danville Street Railway and Light Co., 235 Ill. 566, 85 N.E. 921. It has been stated many times that if a person without fault on his part is confronted with a sudden danger or apparent sudden danger, the obligation resting upon him to exercise ordinary care for his own safety does not require him to act with the same deliberation and foresight which might be required under ordinary circumstances. Synwolt v. Klank, 296 Ill. App. 79, 15 N.E. 2d 895. Looking at the circumstances facing plaintiff at the time in question, can it be said as a

matter of law that plaintiff was negligent? Would all reasonable minds reach the same conclusion that the conduct of the plaintiff violated all rational standards of conduct applicable to persons in similar circumstances? In the instant case we do not believe it can be said that plaintiff was guilty of negligence as a matter of law. A court can only determine as a matter of law that the evidence does not tend to show due care on the part of a plaintiff when no other reasonable conclusion can be drawn from the uncontradicted facts and from the evidence that is favorable to plaintiff. Hanta v. Chicago City E. E. Co., 284 Ill. 246, 120 N.E. 1; Thomas v. Buchanan, 357 Ill. 270, 192 N.E. 215; Budds v. Keeshin Motor Express Co., 326 Ill. App. 59, 61 N.E.2d 579. Such is not the situation in the case at bar.

Plaintiff's evidence prima facie presented a fact case for the jury both as to the question of defendant's negligence and the exercise of due care by plaintiff. It was therefore error for the court to direct a verdict for defendant.

The judgment of the Circuit Court of Sangamon County is therefore reversed and the cause is remanded for a new trial.

Reversed and remanded.

Reynolds, J., and Carroll, J., concur.

Abstract

556

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A.D., 1959

General No. 10212

Agenda No. 20

Margaret H. Sprague,

Plaintiff-Appellee,

vs.

New York, Chicago and St. Louis
Railroad Company, a Corporation,

Defendant-Appellant.

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20 I.A. 430
Appeal from
Circuit Court
McLean County

CARROLL, J.

Defendant appeals from a judgment of the Circuit Court of McLean County, entered upon a jury verdict for plaintiff in an action for personal injuries sustained in a collision between her automobile and defendant's locomotive.

Reversal of the judgment is urged upon the ground that plaintiff, as a matter of law, was guilty of contributory negligence and that the trial court should have allowed defendant's motion for a directed verdict. In the alternative, defendant contends it should have been granted a new trial. No question was raised on the pleadings or as to the amount of the verdict.

In determining whether the trial court erred in denying

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on to the source of the verdict. We have presented a new trial. The question was raised on the elements tested verdict. In the discussion, defendant contends it should be that the trial court should have allowed defendant's motion for a verdict, as a matter of law, was proper on defendant's negligence. Inverted of the judgment is noted upon the ground that

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defendant's motion for a directed verdict, the governing rule is firmly established. Such a motion should be allowed if when all the evidence is considered, with all reasonable inferences to be drawn therefrom, in its aspects most favorable to the parties against whom the motion is directed, there is a total failure to prove one or more of the essential elements of the case. Tucker v. New York, Chicago and St. Louis RR Co., 12 Ill. 2d 532; Carrell v. New York Central RR Co., 384 Ill. 599; Greenwald v. Baltimore & Ohio RR Co., 332 Ill. 627.

The collision in question occurred in the City of Bloomington, at the intersection of Madison Street and defendant's railroad track. At that point, Madison Street, which runs in a northerly and southerly direction, is crossed by a switch track, defendant's track, and those of the New York Central Railroad. As the crossing is approached from the south, the New York Central tracks are first encountered and the defendant's tracks are about 15 feet to the north. On the southeast and northwest corners of the crossing there are double flashing lights located approximately 14 feet from the nearest track on each side. At the southeast corner of the crossing, there is a 4-story brick building referred to in the record as the John Deere Building which is 14 feet south of the nearest or New York Central tracks. The distance from the south rail of the New York Central tracks to the south rail of defendant's tracks is about 15 feet.

Plaintiff testified that at about 12:30 o'clock P.M. on

defendant's motion for a directed verdict, the governing rule is
 only established. Such a motion should be allowed if when all the
 evidence is considered, with all reasonable inferences to be drawn
 therefrom, in its aspects most favorable to the parties against whom
 a motion is directed, there is a total failure to prove one or more
 the essential elements of the case. Tucker v. New York, Chicago and
St. Louis RR Co., 18 Ill. 2d 532; Garnett v. New York Central RR Co.,
 111. 599; Greenwald v. Baltimore & Ohio RR Co., 332, 111. 627.
 The collision in question occurred in the City of Bloomington,
 the intersection of Madison Street and defendant's railroad track.
 that point, Madison Street, which runs in a northerly and southerly
 section, is crossed by a switch track, defendant's track, and there
 the New York Central Railroad. As the crossing is approached from
 the south, the New York Central tracks are first encountered and the
 defendant's tracks are about 15 feet to the north. On the southeast
 and northwest corners of the crossing there are double flashing lights
 located approximately 14 feet from the nearest track on each side. At
 a southeast corner of the crossing, there is a 4-story brick building
 referred to in the record as the John G. Ware Building which is 14 feet
 north of the nearest New York Central tracks. The distance from
 a south rail of the New York Central tracks to the south rail of
 defendant's tracks is about 15 feet.
 Plaintiff testified that at about 12:30 o'clock P.M. on

October 5, 1956, which was a clear and dry day, she was driving her automobile north on Madison Street approaching the crossing; that her speed was 15 to 20 miles per hour; that when she was in the middle of the block south of the crossing, she looked for the flasher lights but did not see any; that when her car was 15 feet south of the flasher sign at the southeast corner of the crossing, she again looked to see if the lights were working; that she saw no lights; that the speed of her car continued at 15 to 20 miles per hour; that as she approached the crossing she did not apply her brakes although the same were in good working order; that she came on down to the tracks; that when she got to where she could see, she looked to the left and turned and looked to the right at which time she saw defendant's engine coming towards her; that when she first saw the engine it was a few feet from her and was moving and she stepped on the gas to get away from it; that the engine struck the back of her car; and that she continued on across the tracks and stopped. On cross-examination she testified that the first time she looked for a train to her right was when her car was already on defendant's track; that the locomotive was then within 5 feet of her car and moving; and that she could not tell its speed so she speeded up her car.

Plaintiff further testified that she was 51 years of age; that she had lived in Bloomington all her life; that she had driven over the crossing in question on other occasions; that she knew it crossed more than one railroad track; that she knew that there was a

October 5, 1956, which was a clear and dry day, she was driving her automobile north on Madison Street approaching the crossing; that speed was 15 to 20 miles per hour; that when she was in the block south of the crossing, she looked for the flasher light; that when her car was 15 feet south of the flasher light at the southeast corner of the crossing, she again looked to see if the lights were working; that she saw no light; that the speed of her car continued at 15 to 20 miles per hour; that as she approached the crossing she did not apply her brakes although the same were in good working order; that she came on down to the tracks; that when she got where she could see, she looked to the left and turned and looked to the right at which time she saw defendant's engine coming towards her; that when she first saw the engine it was a few feet from her and was coming and she stepped on the gas to get away from it; that the engine struck the back of her car; and that she continued on across the tracks and stopped. On cross-examination she testified that the first time she looked for a train to her right was when her car was already on defendant's track; that the locomotive was then within 5 feet of her car and moving; and that she could not tell its speed as she approached her car.

Plaintiff further testified that she was 21 years of age; that she had lived in Bloomington all her life; that she had driven in the crossing in question on other occasions; that she knew it crossed more than one railroad track; that she knew that there was

building on the right hand side as she approached the crossing from the south; that she knew the building was close to the sidewalk and that she knew it was difficult to see to the east until she was close to the corner of the building.

Plaintiff produced no other witness to the occurrence and the foregoing testimony substantially represents the proof offered on the issue of plaintiff's due care. A number of photographs showing the physical condition of the crossing were admitted by stipulation. From these photographs it appears that at a place 40 feet South of the crossing, the view to the east, the direction from which defendant's engine approached, was unobstructed for several hundred feet.

The record further shows that at the time of the collision, defendant's locomotive was being used in a switching operation. It was moving 3 to 4 miles per hour and after the contact with plaintiff's car, it only moved forward about 25 feet and stopped, with the rear end between the center and west edge of Madison Street.

The rules of law applicable to the facts disclosed by this record are well settled. As the court said in Tucker v. New York, Chicago and St. Louis RR Co., supra.:

"There is no substantial dispute as to the governing rules of law in the case before us. It is well settled that railroad crossings are dangerous places, and that in crossing them a person must approach the track with a degree of care proportionate to the known danger. The law requires that the traveler make diligent use of his senses of sight and hearing and exercise care commensurate with the danger to be anticipated. (Moudy v. New York, Chicago and St. Louis Railroad Co. 385 Ill. 446; Provenzano v. Illinois Central Railroad Co. 357 Ill. 192; Greenwald v. Baltimore and Ohio Railroad Co. 332 Ill. 627.) Nor does the law tolerate the absurdity of permitting a plaintiff to say he looked and did not see the approaching train, when had he looked he would have seen it. (Dee v. City of Peru, 343 Ill. 36;

the corner of the building.

14141111 presented to answer witness to the statements and the foregoing testimony substantially represents the actual effect of the same. A number of photographs showing the physical condition of the crossing were submitted by stipulation. The above photographs are shown in a place to the south of the crossing, the view to the west, the crossing from which defendant's vehicle approached, and another view from a different angle.

[illegible]

The rules of law applicable to the facts disclosed by this record are well settled. As the court said in *Thayer v. New York*,
: *Thayer v. New York*, 100 N.Y. 201, 204, 10 N.E. 271, 272:

There is no substantial evidence as to the character
of the law in the case before me. It is well
settled that religious exercises are essential to the
and that in exercising them a person must approach the
them with a degree of reverence appropriate to the nature
of the law. The law requires that the exercises be
conducted with a degree of solemnity and reverence and
that the exercises be conducted with a degree of solemnity
and reverence. (1) People v. New York, Chicago and St. Louis Ry.
1912, 222 N.Y. 101, 102, 103, 104, 105, 106, 107, 108, 109,
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Greenwald v. Baltimore and Ohio Railroad Co. 332 Ill. 627; Holt v. Illinois Central Railroad Co. 318 Ill. App. 436.) It is also true, as plaintiff contends, that there may be facts such as obstructions to view or distractions that might mislead plaintiff, without his fault, or excuse a failure to look and listen. Gills v. New York, Chicago and St. Louis Railroad Co. 342 Ill. 455; Chicago and Alton Railroad Co. v. Pearson, 184 Ill. 386."

Plaintiff's testimony makes it clear that the precautions she took as she approached defendant's tracks consisted of looking for the flasher lights. She first looked for these lights when in the middle of the block south of the crossing. She looked for them again when she was 15 feet from the flasher signal installation on the east side of Madison Street. At no time did she reduce her speed or apply her brakes. The record is silent as to whether she listened for a bell or other sound signal. Likewise, there is no evidence that such signals could not be heard because of other noises or interference therewith. It is true plaintiff states she saw no light, although members of the train crew testified that the lights were operating, but even assuming that the same were not in operation, such failure of an electrically operated signal, does not relieve a traveler from his duty to look and listen for approaching trains. Grubb v. Illinois Term. Co. 366 Ill. 330; Applegate v. Chicago & Northwestern Railway Co. 334 Ill. App. 141. When plaintiff was at the point 15 feet from the flasher light, defendant's locomotive was at the east edge of Madison Street and plainly visible to her if she had looked at the track to her right. Obviously she made no attempt to discover the possible presence of a train approaching other than to look for the flasher light until she had entered upon the crossing.

The remaining factor to be considered is whether plaintiff

Illinois Central Railroad Co. v. Chicago & North Western Railway Co., 318 Ill. App. 3d 111. 112. It is also true, as defendant contends, that there may be facts such as position or view or distance that might excuse plaintiff, without his fault, for a failure to look and listen. Illinois v. New York, Chicago and St. Louis Railway Co., 312 Ill. 123; Chicago and North Western Railway Co. v. Chicago & North Western Railway Co., 312 Ill. 334.

Plaintiff's testimony makes it clear that the presumption she was on the approached defendant's tracks was a matter of looking for the flasher light. She first looked for these lights when in the middle of the block south of the crossing. She looked for them again when she was 10 feet from the flasher light installation on the east side of the crossing. At no time did she pause nor speed up or slow down. The witness is silent as to whether she listened for a bell or other sound signal. Likewise, there is no evidence that such signals could not be heard because of other noises or interference therewith. It is true plaintiff states she saw no light, although members of the train crew testified that the lights were operating, but even assuming that the same were not in operation, such failure of an electrically operated signal does not relieve a traveler from his duty to look and listen for approaching trains. Illinois Central v. Chicago & North Western Railway Co., 312 Ill. App. 111. 112. When plaintiff was at the point 15 feet from the flasher light, defendant's locomotive was at the east end of the track and plainly visible to her if she had looked at the track. Obviously she made no attempt to discover the possible presence of a train approaching other than to look for the flasher light. Still she had entered upon the crossing.

The remaining factor to be considered is whether plaintiff

view was obstructed to the extent that under the circumstances she was relieved of the duty to look and listen.

The record makes it clear that plaintiff was not in the position of a driver approaching an obscured crossing without knowledge of the danger confronting her. Plaintiff does not contend that she was misled or lulled into a false sense of security by reason of an obstruction to her view. On the contrary, plaintiff was familiar with the crossing and looked for its flasher lights when she was in the middle of the block to the south. It is thus evident that plaintiff was aware of the fact that she was approaching a railroad crossing and the dangers attendant thereto.

The photographs in evidence show that when an automobile reaches a point 40 feet south of defendant's tracks, it's driver has an unobstructed view to the right. It is undisputed that when plaintiff reached such point, defendant's engine was then moving at only 2 to 4 miles perhour. Obviously, if plaintiff had looked to her right she could have seen it and could have avoided the collision by applying her brakes. Under these circumstances, we think it must be said that there was no obstruction to view which excused plaintiff's failure to look.

It is apparent that the evidence affords no basis for any conclusion other than that plaintiff either failed to look for an approaching train or failed to do so until she was in a position where a collision could not be avoided. In either case she was guilty of

view was obstructed to the extent that upon the circumstances she was relieved of the duty to look and listen.

The record makes it clear that Plaintiff was not in the position of a driver approaching an obscured crossing without knowledge of the danger confronting her. Plaintiff does not contend that she was misled or lulled into a false sense of security by reason of a obstruction to her view. On the contrary, Plaintiff was familiar with the crossing and looked for its flashing lights when she was in the middle of the block to the south. It is thus evident that Plaintiff was aware of the fact that she was approaching a railroad crossing and the danger attending thereto.

The photographs in evidence show that when an automobile reaches a point 40 feet south of defendant's tracks, it's driver has an unobstructed view to the right. It is undisputed that when Plaintiff entered such point, defendant's engine was then moving at only 2 to 4 miles per hour. Obviously, if Plaintiff had looked to her right she could have seen it and could have avoided the collision by applying her brakes. Under these circumstances, we think it must be said that there was no obstruction to view which excused Plaintiff's failure to look.

It is apparent that the evidence affords no basis for any conclusion other than that Plaintiff either failed to look for an approaching train or failed to do so until she was in a position where collision could not be avoided. In either case she was guilty of

contributory negligence as a matter of law. Monken v. Baltimore & Ohio Railroad Co., 342 Ill. App. 1; Tucker vs. New York, Chicago and St. Louis RR Co., *supra*; Greenwald vs. Baltimore & Ohio RR Co., *supra*.

Because of plaintiff's failure to prove due care on her part which was an essential element of her case, the trial court should have directed a verdict in favor of defendant. Accordingly, the judgment of the circuit court is reversed.

Reversed.

Roeth, P.J. and Reynolds, J., concur.

... as a matter of law. Wagon v. Baltimore & Ohio Railroad Co., 202 Ill. App. 1st 100 (1911). Wagon v. Baltimore & Ohio Railroad Co., 202 Ill. App. 1st 100 (1911). Wagon v. Baltimore & Ohio Railroad Co., 202 Ill. App. 1st 100 (1911).

Because of plaintiff's failure to prove the case on her part which was an essential element of her case, the trial court should have directed a verdict in favor of defendant. Accordingly, the judgment of the circuit court is reversed.

Reversed.

Rein, P. J. and Reynolds, J., concur.

Agenda No. 111

12 DIVISION

APPELLATE COURT OF ILLINOIS

October Term A.D. 1958

201.4.431

Appeal from the
Circuit Court of
Will County.

and

DOVE. J.

An affidavit for garnishment was filed in the Circuit Court of Will County on May 29, 1957 reciting that Theodore Costema had recovered a judgment against John A. Zelko for \$1219.57 and costs; that the defendant had no property within the knowledge of affiant but that Homewood Savings and Loan Association, a corporation, Howard W. Jones and Harriet E. Jones were indebted to Zelko or that they had effects or estate of Zelko in their hands. The prayer was that the Loan Association and Mr. and Mrs. Jones be summoned as garnishees. On the same day six interrogatories were filed which the garnishee defendants were requested to answer. Service was duly had on the defendants and on June 17,

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1957 the Loan Association filed its answer to said interrogatories.

The interrogatories and the verified answers filed thereto by the Loan Association are:

Q-Had you in your possession, charge or control, at the date of the service of the Writ in this case, any money, rights, credits or effects owned or due to JOHN A. ZELKO? A. No, see below.

Q-Were you indebted to the defendant at the date of the service of said Writ of Attachment? If so, how much, for what, due and when payable? A. No, see below.

Q-Please state what effects or debts of the defendant there were at the date of said Writ of Attachment in the hands of any other person or persons beside yourself, to the best of your knowledge and belief? A. See below.

Q-Had you in your possession, charge or custody, at the date of the said Writ, any lands, tenements, goods or chattels of said JOHN A. ZELKO? A. No, see below.

Q-Had you, at the date of the service of said Writ, any rights, credits or effects of said defendant (not hereinbefore specified), in your possession, charge or custody, from you due and owing at the service of said Writ, or at any time since, or which may hereafter become due? If so, state the value, amount, when due, and how payable? A. See below.

Q-Have you any property, goods, chattels, rights, credits or effects of any kind belonging to said defendant or in which JOHN A. ZELKO interested? If so, describe the same fully, giving amount, items and describe the same fully and particularly. A. The Rosewood Savings and Loan Association states that it would make a loan to HOWARD W. JONES and HARRIET E. JONES for the construction of a house at about 16200 So. Union, Harvey, Illinois, and that said house is not completed and that at present, there is a balance on this construction loan of about \$2292.50 which money can only be paid out for labor and material put in said house and which money must be held for the completion of said house. This defendant further states that he did not engage the defendant JOHN A. ZELKO to build said house but that he was hired by Howard W. Jones and possibly his wife, Harriet E. Jones. This defendant states that it appears there may be some money due the defendant Zelko but the exact amount is not known for the reason that there might be additional claims for labor and material of sub-contractor's and after all

bills for labor and material are paid and all details of the house are complete, any so called profit would belong to Zelko. This defendant is willing to give any information in reference thereto from time to time.

No further steps were taken until April 16, 1958 at which time the Loan Association filed its motion for a judgment of dismissal upon its answer. On May 22, 1958 John A. Zelko for the use of Theodore W. Oostema filed his motion praying that the court determine the sum of money due Zelko or other successful claimants and that an order be entered directing the defendants to deposit with the circuit clerk the money held by the Loan Association by reason of its loan agreement with Mr. and Mrs. Jones. On May 23, 1958 these motions were heard and the following order entered:

"On this day comes the plaintiff by Wayne Johnson of the firm of Herschbach, Tracy & Gradinger, and also come the defendants in garnishment by Burton Evans and Eugene C. Shotts. Hearing had on motion of Homewood Savings & Loan Association to be dismissed from these proceedings and motion is denied. The plaintiff in garnishment now moves the Court for an order directing that monies be placed in the hands of the Court and that the Court determine the claims, and the Court sits and hears the arguments of counsel, and being now fully advised in the premises, denies said motion. Therefore it is considered and ordered by the Court that the defendant, John A. Zelko, for the use of the plaintiff, Theodore Oostema, do have and recover of and from the Homewood Savings & Loan Association, the sum of One Thousand Two Hundred and Twenty Dollars and Sixty-seven cents (\$1220.67), and costs of suit and have execution issue therefor. On motion of said garnishee defendant, Homewood Savings & Loan Association, the appeal bond is fixed at \$2000.00."

Thereafter on June 2, 1958 the Loan Association filed its motion to vacate the judgment entered on May 23, 1958 which was heard and denied and the Loan Association Appeals.

The substance of the answer of appellant-garnishee is that Howard W. Jones and perhaps his wife had engaged John A. Zelko to build a dwelling house at a designated location in Harvey, Illinois; that the Loan Association had made a construction loan to Mr. and Mrs. Jones; that the dwelling on June 17, 1957 was not completed and that there is a balance in this loan/ of about \$2292.50 which can only be paid out
account

in reference to the fact that the
no other. This reference is given to the fact that
the case is complete, and no other facts are shown
bills for labor and material are not all payable at

THE UNIVERSITY OF CHICAGO

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* In Germany, the *Ministerium für Arbeit und Sozialordnung* (Ministry for Labour and Social Order) is the competent authority.

Wiederholungsfragen: 1. Was ist die Bedeutung der ... 2. ... 3. ...

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... also in 1974 a further 100,000 were added to the total.

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See also 100-101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 91

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for labor and material used in the construction of the house and that this sum must be held for the completion of said dwelling. The answer further discloses that there may be some money due Zelko under his contract with Mr. and Mrs. Jones but the exact amount was not then known as there might be additional sub-contractor's claims and that the Association would give any further information it could from time to time.

The plaintiff did not challenge or question the allegations of this answer so the statement therein that Mr. and Mrs. Jones had engaged Zelko to build a home for them; that the garnishee had made a home construction loan to them; that the home was not completed; that there was approximately \$2292.50 in the loan account; that this sum could only be paid out for labor and material used in the construction of the dwelling and is to be held until the completion of the home, must be accepted as true. (Morris v. Beatty, 390 Ill. 568 and cases cited).

From the time this answer was filed on June 17, 1957 until April 18, 1958 no steps were taken in this case. On that day appellant filed its motion for judgment on its answer and a month later, May 22, 1958, plaintiff filed his motion asking the court to determine the amount due Zelko, the contractor, and to enter an order directing appellant to deposit with the Circuit Clerk the money it held by reason of its loan agreement with Mr. and Mrs. Jones.

When the motion of the garnishee to be dismissed and this motion of appellant for an order on the garnishee to deposit the money in its hands with the Circuit Clerk came up for hearing, the Court, without hearing any evidence, entered an order denying both motions and rendered judgment against the garnishee for \$1220.67.

In the instant case. Zelko is the judgment debtor and the issue here was whether the garnishee was indebted to Zelko. If it was at the time when appellant's answer was filed and the amount was a liquidated sum due him without any uncertainty or contingency then that amount was subject to garnishment. (Wheeler v. Chicago Title and Trust Co., 217 Ill. 128, 135; Capes v. Burgess 135 Ill. 61; Cizek v. Illinois National Casualty Co., 370 Ill. 572, 576). In 4 Am. Jur., Title Attachment and Garnishment, sec. 20, at page 683 it is said: "In the case of a construction contract where the employer is not to become indebted to the contractor until performance in all particulars, there is no indebtedness owing to the contractor which may be reached in a garnishment proceeding until the terms of the contract have been performed".

Our statute provides that the trial in garnishee proceedings shall be conducted as in other civil cases but without the formality of pleading. (Ill. Rev. St. Chap. 62, Sec. 7). The general rule is that a party to any proceeding cannot have affirmative relief without a motion, petition or pleading of some kind asking for it. (Powell v. Starr, 100 Ill. App. 105, 106; Wood v. Wood, 327 Ill. App. 557). A judgment must be responsive to the pleadings and relief should not be granted where not pleaded (Warnes v. Champaign County Seed Co., 5 Ill. App. 2d, 151, 156).

The motion which appellee filed did not ask for a judgment such as the trial court rendered. It was beyond the scope of his motion and cannot stand.

The judgment of the Circuit Court of Will County is therefore, affirmed insofar as it denied the motion of appellant to be dismissed. The judgment rendered in favor of John^{A.}/Zelko for the use of Theodore Oostema and against appellant for \$1220.67

and costs is reversed and this cause is remanded to the Circuit Court with directions to hear and determine, as in other civil cases, the motion of John A. Zelko for the use of Theodore Costema filed therein on May 22, 1958.

AFFIRMED IN PART: REVERSED IN PART,
AND REMANDED WITH DIRECTIONS.

SPIVEY, P.J. CONCURS

MC NEAL, J. CONCURS

and words as printed and not as they are written in the
original form and direction as they are written, as in
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THEY ARE NOT AS THEY ARE WRITTEN IN THE
ORIGINAL FORM AND DIRECTION AS THEY ARE WRITTEN, AS IN

SPIVEY, P. 1. CONCURS

MC NEAL, J. CONCURS

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STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

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General No. 10197

Agenda 12.

Ralph A. Hatcher, Administrator of the
Estate of Nina Mae Hatcher, deceased,

Plaintiff-Appellee,

vs.

The New York Central Railroad Company,

Defendant-Appellant.

Appeal from
Circuit Court
Tazewell County

REYNOLDS, J.

This cause arises out of collision between an automobile driven by Ralph A. Hatcher and a train of the defendant at the Allentown Crossing east of the City of Pekin, in Tazewell County, Illinois, on September 16, 1955. In the collision Nina Mae Hatcher, 27 years of age, the mother of four children between the ages of six and eleven was killed. Ralph A. Hatcher, husband of the deceased Nina Mae Hatcher brought suit as administrator of her estate. The jury returned a verdict for the plaintiff in the amount of \$25,000.00.

The Hatcher family on September 16, 1955, left their home

about 3:00 o'clock p.m. for a Sunday afternoon drive. Ralph A. Hatcher was driving. In the front seat Hatcher was on the left, his mother on the right and his wife was in the middle. In the rear seat there were three daughters of Ralph and Nina Mae Hatcher, namely Glende Jo, Connie Ann and Joan Evelyn. Standing on the floor just back of the front seat there was the son, Gordon. The car was driven from their home on the Allentown Road toward Pekin at a speed of 25 to 30 miles per hour.

About 900 feet east of the crossing where the collision occurred, the road dips downward, curves slightly to the right, and then reverses into an "S" turn. The crossing is somewhat east of the center of the "S" curve of the road. After crossing the railroad the road then goes uphill to the right. The road itself on both sides of the railroad crossing is a gravel road. The railroad, approaching the crossing from the south is curving, and this curve continues after passing the crossing. The curve of the railroad is not a sharp curve but there is a definite curve of the track, beginning north of the crossing and continuing to the east south of the crossing. The railroad of the defendant at this point is a single track, with planking along the rails for the crossing. The Allentown Road from the east to the west, dips some 21 feet to the crossing and then proceeding westwardly goes

up a hill to the right. Pictures were introduced into evidence showing how far a train could be seen by anyone approaching said crossing from the east. The pictures were taken in the middle of the gravel road, of the crossing and were from distances of 12, 25, 35, 50, 60, 75, 85 and 100 feet from the east or north rail of the railroad.

The testimony of Ralph Hatcher as to speed is not contradicted and he testified that when he reached the dip in the road east of the crossing, he was traveling 30 miles per hour; that he decreased his speed and at the time of the collision, and as he approached the crossing, he was traveling at about 20 miles per hour. Hatcher's mother and his wife were talking about general matters as they approached the crossing. Hatcher testified he looked ahead and to the left and right as he approached the crossing; that his wife was talking to his mother and was looking ahead. None of the occupants of the car, so far as the evidence discloses, saw the train before it struck the car, and did not hear a train bell or whistle. The train struck the car slightly to the rear of center on the right side, and hurled it into an open ditch on the west

us a bill to the right. Witnesses were introduced into witness
showing how far a train could be seen by anyone approaching it
crossing from the east. The pictures were taken in the middle of
the travel road, of the crossing and were from distances of 10, 20,
30, 40, 50, 60, 70, 80 and 100 feet from the west or north rail of the
crossing.
The testimony of John D. Smith as to speed is not contradicted
and he testified that when he reached the 100 ft. in the road east of
the crossing, he was traveling 30 miles per hour; that he decreased
his speed and at the time of the collision, and as he approached the
crossing, he was traveling at about 20 miles per hour. Witnesses
other and his wife testified about general matters as they
approached the crossing. Witness testified he looked ahead and
to the left and right as he approached the crossing; that his
wife was talking to his mother and was looking ahead. Some of
the occupants of the car, as far as the evidence disclosed, saw
the train before it struck the car, and did not hear a train bell
or whistle. The train struck the car slightly to the rear of center
on the right side, and hurled it into an open ditch on the west

side of the tracks. The speed of the train, with diesel engine pulling the train, was about 40 miles per hour. Nina Mae Hatcher, Hatcher's mother, and two of the daughters were killed in the collision. The engineer did not see the car until after the collision. The fireman saw the car just a split second before the collision and called to the engineer "Big Hole" meaning to apply emergency air brakes. The engineer did apply the emergency air brakes and the train was stopped in about two train lengths.

The testimony of the engineer and the fireman of the train fix the speed of the train at about 40 to 45 miles per hour when it approached the Allentown Crossing. Of the twenty-eight witnesses testifying, Mary Becker and A. E. Duttonly, were photographers. William L. Swallow was the claim investigator for the railroad and his testimony was mainly as to his investigation and statements made to him by witnesses interviewed by him. Delpha M. Reed and Pauline Deahl were reporters and stenographers and testified as to their notes and transcription of testimony. Vern A. Nichols was a gang foreman for the railroad at the time of the accident. The express messenger on the train, Walter White, was working in the express car, did not hear any whistle or bell and only knew there was something out of the ordinary when the air brakes for an emergency went on. James W. Vest was a civil engineer and his testimony in the main deals

side of the track. The speed of the train, with dinner wagon
pulling the train, was about 25 miles per hour. When the witness
witnessed the accident, and was on the passenger car, he was
collision. The accident did not end the car until the
collision. The witness was on the car, and he was not
collision and did not go to the witness. This was the only
evidence of the accident. The witness was on the passenger car
evidence and the train was stopped at that time.
The testimony of the witness was the same as the train
in the speed of the train at about 25 miles per hour when
it approached the accident. The witness, in the train, was
testimony, that he was on the train, and he was not
William A. Wilson was the only witness for the railroad and
his testimony was mainly as to his statement that the railroad
to him by witness testimony of him. He was a good and reliable
man, and his testimony was reliable as to the
facts and circumstances of the accident. The witness
testimony for the railroad at the time of the accident. The witness
evidence of the train, which was on the train in the witness car,
did not have any other evidence and only the train was
out of the accident and the witness was not in the witness car.
James A. West was a well-known witness and his testimony in the case

with the plat introduced in evidence.

Certain facts connected with this accident are fairly well established and are without contradiction. 1. The speed of the automobile was some where between 20 and 25 miles per hour as it neared the crossing. 2. Neither driver of the car nor any of the passengers in the car saw the train until just before or at the time of the impact. 3. The speed of the train was about 40 to 45 miles per hour as it approached the crossing.

The disputed matters are these: 1. Was there any whistle blown by the train crew as it approached the crossing? 2. Was there any bell being rung on the train as it approached the crossing?

The testimony of the brakeman of the railroad, William H. Stoner, was that he heard the whistle and the whistle was blowing as the emergency brakes were applied. Earl Simon, the engineer, testified that the bell was ringing continuously, and that the whistle was blown, two long blasts, one short and a long. James W. Herold, the fireman testified that the whistle was blown and that the bell was ringing. Charles Buchanan, living about half a mile from the Allentown Crossing, testified that he heard the whistle for the Allentown Crossing. Mrs. William Reeder, heard the whistle for both the Rosenberg Crossing and the Allentown Crossing. Also heard the bell ringing.

with the first introduction to the subject.

Therefore, the first object of the study is to determine the nature and extent of the problem, and to determine the causes of the problem. The second object is to determine the nature and extent of the problem, and to determine the causes of the problem. The third object is to determine the nature and extent of the problem, and to determine the causes of the problem. The fourth object is to determine the nature and extent of the problem, and to determine the causes of the problem. The fifth object is to determine the nature and extent of the problem, and to determine the causes of the problem.

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Against this testimony there is the testimony of a number of witnesses who testified that they heard no bell or whistle as the train approached the Allentown Crossing. Mr. and Mrs. Poppenhouse, who arrived at the scene of the accident a very short time after the accident both testified that they heard no whistle or bell. Walter Fauth, who lives some 500 feet from the crossing testified he was sitting on his porch and heard no bell ringing and heard no whistle for the crossing. Mabel Saal who lives about 900 feet from the crossing and about 200 feet from the railroad, testified she was in her front room. Heard the noise of the train passing, but heard no whistle for the crossing and heard no bell ringing. Mrs. Saal saw the Hatcher car pass her home. John Saal, son of Mabel Saal, was working on his car across the road from his home, which was some 400 feet from the railroad. He saw the Hatcher car pass and corroborates Hatcher as to speed. He heard the whistle of the train in Pekin, and heard it about a half dozen times as it left Pekin. He did not hear any whistle for the Allentown Crossing. He heard the noise of the crash, and went to the scene of the accident, and at the request of the conductor, called for an ambulance and the sheriff. August S. Gingotti who lives 175 yards east of the crossing, heard the train idling after the accident, but did not hear a whistle for the crossing

Against this testimony there is the testimony of a number of
 witnesses who testified that they found no signs of violence in the
 train compartment the afternoon following. The next morning,
 on arrival at the scene of the accident a very short time after
 the accident body testified to a long search on either side of
 either track, and also that they found the following testified
 to see nothing in the train and that a full search was made on
 either side of the tracks, and that the train about 10 feet
 from the front of the train was found to be the railroad, testified
 to see it but that they found the body of the man, and
 found no evidence for the railroad but found no body sleeping. It
 was the body of the man who was found, and that was the body
 was working in his car across the road from his house, which was some
 10 feet from the railroad. He was the father of two and was
 never together in the ground. He found the object of the train in
 train, and found it about a half dozen times as it left train. He did
 not have any objection to say otherwise however. He found the man
 at the scene, and went to the scene of the accident, and at the request
 of the manager, called for an ambulance and the sheriff.

or the bell ringing. Alfred Cingotti, brother of August E. Cingotti, testified he was at his home on the day of the accident. He was watching television, but didn't hear the whistle or bell. Geneva Merritt, who lives in Rosenberg Acres, about three blocks from the Allentown Crossing, was stretching curtains in her yard. She heard the train whistle for the Rosenberg Acres crossing, but heard no bell ringing. She heard no whistle for the Allentown Crossing. Daniel Kohler, who lived about 500 feet from the Rosenberg Acres Crossing, testified that the Rosenberg Acres crossing was about one quarter of a mile from the Allentown Crossing. He heard the train whistle for the Rosenberg Acres Crossing, and testified the train whistled for this crossing two or three times. He did not hear a bell for the Rosenberg Acres Crossing, and heard no whistle or bell after the train crossed the Rosenberg Acres Crossing. Jean Hatcher, aged ten years, and Gordon Hatcher, aged eight years, children of the kind Mae and Ralph Hatcher, both testified they did not see the train or hear the whistle or bell.

There was some testimony that some of these witnesses for the plaintiff who testified that they heard no bell or whistle, did admit to Mr. Swallow or in depositions taken before the trial that the whistle could have been sounded or the bell rung, and they would not have heard.

[illegible]

There are some legends that speak of a great difference in the
distances we traveled that they were as well as others, the
advice to the traveler is to be prepared to travel with
the white birds have been recorded at the same time, and they were
not very many.

While the testimony of these witnesses was negative, yet it was proper testimony and it was the province of the jury to determine the weight of such testimony.

The speed of the train, the speed of the automobile, the topography of the crossing, the gravel road, and the railroad, are not in dispute. The only disputed questions is whether or not the whistle was blown for ^{the} crossing, whether the bell was ringing, and whether or not the driver of the car, Hatcher, stated shortly after the accident that he tried to stop, but his car slid on the gravel. This testimony of the admission by Hatcher of trying to stop and sliding, was by Charles C. Stoner, conductor of the train, and Walter White, the express messenger. William Beavers, deputy sheriff also testified that Hatcher said at one point he didn't see the train, and later said he didn't see it in time to stop. Beavers said Hatcher was bleeding and seemed dazed and in shock. This testimony of Stoner, White and Beavers raises questions of fact to be considered by the jury.

The appeal raises the questions of proof of negligence on the part of the defendant, alleges contributory negligence of the deceased, and contends that the damages awarded were excessive.

It was proper testimony and it was the province of the jury to determine the weight of such testimony.

[illegible]

The report relates the question of proof of negligence on the part of the defendant, alleging contributory negligence of the deceased, and contains the findings of the jury and the conclusions of the court.

The necessity that the plaintiff prove the negligence of the defendant railroad, and the absence of contributory negligence on the part of the plaintiff's intestate, is basic to any negligence case in Illinois. The burden of this proof is upon the plaintiff at all times during the trial.

Section 58, Chapter 114, Illinois Revised Statutes, requires that the railroad maintain the so-called "cross-buck" signs with the lettering "Railroad Crossing" or "Look Out for the Cars", at each crossing, except in cities and incorporated towns. As to this requirement, there is no question in this case, that the signs were in place and that the driver of the automobile, Ralph Hatcher saw the signs.

Section 59, Chapter 114, Illinois Revised Statutes, requires the railroad to cause a bell, and a whistle or horn to be placed and kept on each locomotive, and to cause the same to be rung or sounded by the engineer or fireman, at a distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or sounding until the highway is reached. The duty thus imposed by statute requires the whistling or ringing to begin when the locomotive is eighty rods from the crossing and shall be continued until the train reaches the crossing. Elgin, J.&E.R. Co. v. Lawlor, 132 Ill.App. 280, affirmed 229 Ill.621. The

The necessity that the plaintiff prove the negligence of the defendant railroad, and the absence of contributory negligence on the part of the plaintiff's testator, is basic to any negligence case in Illinois. The burden of this proof is upon the plaintiff at all times during the trial.

Section 50, Chapter 114, Illinois Revised Statutes, requires that the railroad maintain the so-called "cross-track" signs with the lettering "Railroad Crossing" or "Look Out for the Cars", at each crossing, except in cities and incorporated towns. As to this requirement, there is no question in this case, that the signs were in place and that the duty of the automobile, Nelson Lechner and the driver, was to observe the signs.

Section 50, Chapter 114, Illinois Revised Statutes, requires the railroad to cause a bell and a whistle or horn to be placed and kept on each locomotive, and to sound the same to be rung or sounded by the engineer or fireman, at a distance of at least thirty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or sounding until the highway is reached. The duty thus imposed by statute requires the whistle or ringing to begin when the locomotive is thirty rods from the crossing and shall be continued until the train reaches the crossing.

Ill. App. Ct. v. Lechner, 135 Ill. App. 210, affirmed 259 Ill. 611.

law does not require that both signals shall be rung or sounded continuously within the eighty rod limits, but does require that one of them shall be continuous. Mardoni v. Chicago & E.I.R.Co., 261 Ill. App. 339; Butler v. Illinois Traction, Inc., 253 Ill. App. 135; Applegate v. Chicago & N.W. Ry. Co. 334 Ill. App. 141. The failure of the railroad to give the signals as required by statute, is a prima facie case of negligence on the part of the railroad. Mobile & Chic R. Co. v. Dugan, 103 Ill. App. 371.

The question as to whether the bell was ringing and that the whistle was sounded is a disputed question in this cause. The engineer and fireman testify positively that the bell was ringing and the whistle was sounded. Their testimony on this point is corroborated by the brakeman, William R. Stoner, and by Charles Buchanan and Mrs. William Leeder who lived nearby. Opposed to this testimony is the testimony of a number of witnesses who lived in close proximity to the crossing and these witnesses testified that they heard no whistle or bell for the Allentown Crossing. While this testimony is negative, it is admissible for what it is worth. Actually the only person who could positively testify as to the ringing of the bell or the blowing of the whistle is the person operating

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these warning devices. All the others could only testify that they either heard or did not hear the bell or whistle. If these witnesses who testified that they did not hear the bell or whistle, were in such proximity of the crossing that they could have heard the bell or whistle, their testimony is admissible and has probative force on the issue as to whether or not the bell was rung or the whistle sounded. The weight or credibility of this testimony is for the jury. Cellini v. Elgin, J. & E. Ry. Co., 5 Ill. App. 2d 238, 125 N. E. 2d 315. On the question of negligence on the part of the railroad, we believe there is sufficient evidence in the record to present a question of fact for the jury. However, even if the jury holds that the railroad was negligent in failing to give the proper signals for the crossing, it still is not sufficient to support a verdict, unless the plaintiff also proves his intestate to be free from contributory negligence. Two essential elements must be proven by the plaintiff by a fair preponderance of the evidence, namely, that the defendant was negligent, and that the plaintiff's intestate was not guilty of contributory negligence. Failure to prove either is fatal to the plaintiff's case.

Defendant relies upon the case of Tucker v. N. Y. C & St.L.R.R. Co., 12 Ill. 2d 532, contending that the evidence, taken most favorably to the plaintiff, shows that the plaintiff's intestate was guilty of contributory negligence as a matter of law. If it is a question of fact, the

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 the bell or whistle, their testimony is inadmissible and has no probative
 force on the issue as to whether or not the bell was rung or the
 whistle sounded. The weight or credibility of this testimony is
 for the jury. Gellin v. Wain, 4 S.E. 2d 234, 5 Ill. App. 2d 234,
 125 W. 2d 315. On the question of negligence on the part of the
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 fatal to the plaintiff's case.
 Defendant relies upon the case of Troer v. N.Y.C. & N.H.R. Co.,
 12 Ill. 2d 532, contending that the evidence, taken most favorably to
 the plaintiff, shows that the plaintiff's negligence was guilty of contribu-
 tory negligence as a matter of law. If it is a question of fact, the

appellate court has no right to weigh the evidence. If it presents a question of law, the court has the right to examine the evidence to determine whether, as a matter of law, there is any evidence in the record to prove the essential elements of the case. Robinson v. Workman, 9 Ill. 2d 420; Illinois Central Railroad Co. v. Oswald, 338 Ill. 270; Tucker v. N. Y. C. & St.L.R.R. Co., 12 Ill. 2d 532. If the plaintiff failed to prove due care and caution on the part of the plaintiff's intestate, a motion for a directed verdict in favor of the defendant, or a motion for judgment notwithstanding the verdict is proper. In the case of Tucker v. N.Y.C. & St.L.R.R. Co. case, the court said: "It is well settled that railroad crossings are dangerous places, and that in crossing them a person must approach the track with a degree of care proportionate to the known danger. The law requires that the traveler make diligent use of his senses of sight and hearing and exercise care commensurate with the danger to be anticipated. (Moudy v. New York, Chicago and St. Louis Railroad Co. 385 Ill. 446; Provenzano v. Illinois Central Railroad Co. 357 Ill. 192; Greenwald v. Baltimore and Ohio Railroad Co. 332 Ill. 627.) Nor does the law tolerate the absurdity of permitting a plaintiff to say he looked and did not see the approaching train, when had he looked he would have seen it. (Dee v. City of Peru, 343 Ill. 36; Greenwald v. Baltimore

appellate court has no right to review the evidence. It is possible
 a question of law, the court has the right to examine the evidence
 to determine whether, as a matter of law, there is any evidence in the
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Illinois Central Railroad Co. v. Wells, 9 Ill. 2d 42, 204 Ill. 2d 127.
 338 Ill. 270; Illinois Central Railroad Co. v. Wells, 9 Ill. 2d 42, 204 Ill. 2d 127. If
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 exercise care commensurate with the danger to be anticipated. (Moby
 v. New York, Chicago and St. Louis Railroad Co. 192 Ill. 144;
Prosser v. Illinois Central Railroad Co. 327 Ill. 122; Greenwald v.
Chicago and Ohio Railroad Co. 193 Ill. 627.) For these the law
 places the burden of persuasion on the plaintiff to say he looked
 and did not see the approaching train, when he had no doubt he would
 have seen it. (See v. Case of Turn, 343 Ill. 36; Greenwald v. Chicago

and Ohio Railroad Co., 332 Ill. 627; Molt v. Illinois Central Railroad Co. 318 Ill. App. 436.) It is also true, as plaintiff contends, that there may be facts such as obstructions to view or distractions that might mislead plaintiff, without his fault, or excuse a failure to look and listen. Gills v. New York, Chicago and St. Louis Railroad Co. 342 Ill. 455; Chicago and Alton Railroad Co. v. Pearson, 184 Ill. 386." In that case, Tucker was thoroughly familiar with the crossing, and there was nothing in the evidence to show anything that would tend to distract or confuse the plaintiff, or lull him into a false sense of safety. And the court in that case continuing said: "The only question is whether there was any obstruction to view which would either excuse his failure to look, or at least render plausible his assertion that he looked but did not see the train." And the court continuing said: "The testimony in the record fails to show such obstruction."

In the case of Carrell v. N.Y.C.R.R.Co., 384 Ill. 599, in defining the duty on the part of the plaintiff to exercise care in crossing a railroad, the court said: "A duty devolves upon persons about to cross a railroad track to take proper precaution to avoid accident, to be on the alert for possible danger and not recklessly to go upon the track. Railroad crossings are generally recognized

to be dangerous places, and must necessarily be approached with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution in proceeding over a railroad crossing the general knowledge and experience of mankind condemns such conduct as negligence. (Provenzano v. Illinois Central Railroad Co. 357 Ill. 192; Greenwald v. Baltimore and Ohio Railroad Co. 332 Ill. 627.) One who has an unobstructed view of an approaching train is not justified in closing his eyes or failing to look, or in crossing a railroad track upon the assumption that a bell will be rung or a whistle sounded. No one can assume there will not be a violation of the law or negligence of others and then offer such assumption as an excuse for failure to exercise care. The law considers obnoxious a contention to the effect that a person looked but did not see a train when the view was not obstructed, and where, if he had properly exercised his sight, he must have seen it."

The case of Dee v. City of Peru, 343 Ill. 36, presents questions and circumstances analogous to the instant case. There, as in this case, the decedent was not the driver, but was a passenger in an automobile. There, as in this case, the driver did not see the danger. And the court in that case said: "It is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger and ^{to} avoid it, to warn the driver of such vehicle of approaching danger, and he

to be operated, however, but such a condition is not desirable. The
 the amount of time, however, with the same object, but when
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has no right, because someone else is driving, to omit reasonable and prudent efforts on his own part to avoid danger. (Pienta v. Chicago City Railway Co. 264 Ill. 246; Flynn v. Chicago City Railway Co. 250 id. 460; Hoag v. New York Central and Hudson Railway Co. 111 N.Y. 199.) When there is ^{any} evidence before the jury which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law."

In the case of Briske v. Village of Burnham, 379 Ill. 193, the passenger of the automobile did not see any obstruction. The court in passing on the question of contributory negligence on the part of the passenger in the automobile, said:- "It is true, as plaintiff maintains, that contributory negligence is ordinarily and preeminent-ly a question of fact to be decided by a jury. Contributory negligence becomes, however, a question of law when it can be said that all reasonable minds would reach the conclusion, under a particular factual situation, that the facts did not establish due care and caution on the part of the person charged therewith. (Thomas v. Buchanan, 357 Ill. 270; Illinois Central Railroad Co. v. Oswald, 338 Ill. 270.) In such cases, the court should instruct the jury to render a verdict

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for the defendants. (Wilson v. Illinois Central Railroad Co. 210 Ill. 603.) Considering the evidence in its aspects most favorable to the plaintiff, the evidence demonstrates that the proximate cause of plaintiff's injuries was the negligence of Jakubcyk, the driver of the car. There is no substantial testimony to the contrary."

The law as enunciated in the above cases has been stated so many times it would only encumber the record to cite more cases. The law in Illinois is equally settled, that where there is any evidence considered in the light most favorable to the plaintiff, which standing alone and taken with all its inferences and deductions most favorable to the plaintiff, tends to prove the plaintiff's case, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict should be denied.

In the case of Blumb v. Getz, 365 Ill. 273, it was said:

"The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." This principle was approved in the cases of Monroe v. Illinois Terminal R. Co., 346 Ill. App. 307; LeMay v. Jenkins, 6 Ill.

for the defendant. (Exhibit 1, 111-112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

App.2d 57; Ritter v. Hatteberg, 14 Ill. App. 2d 548; Cloudman v. Beffa, 7 Ill. App. 2d 276; Genck v. McGeath, 9 Ill. App. 2d 145; Trennert v. Coe, 4 Ill. App. 2d 166.

The law applicable here is well stated in the case of Ritter v. Hatteberg, 14 Ill. App. 2d 548 at page 554, in this language: "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. Blumb v. Getz, 366 Ill. 273, 277. The question of due care is always a question of fact to be submitted to a jury whenever there is any evidence in the record which, with any legitimate inference that may reasonably and legally be drawn therefrom, tends to show the exercise of due care. Thomas v. Buchanan, 357 Ill. 270, 278. It becomes a question of law only when the evidence is so clearly insufficient to establish due care that all reasonable minds would reach the conclusion that there was contributory negligence. Ziraldo v. W. J. Lynch Co., 365 Ill. 197, 199; McManaman v. Johns-Manville Corp. 400 Ill. 423,430."

In the case of Cloudman v. Beffa, 7 Ill. App. 2d 276, after citing the Blumb v. Getz case, the court said: "Even where the facts are admitted or undisputed but where a difference of opinion as to the inference that may legitimately be drawn from them exists, the questions of negligence and contributory negligence ought to be submitted to the jury, - it is primarily for the jury to draw the

(1939),
inference: Denny v. Goldblatt Bros., Inc./ 298 Ill. App. 325."

The plaintiff cites a number of cases which are not applicable to the questions in this case, for the reason that they are under the Federal Employers' Liability Act. Under that act, "contributory negligence" is not a defense, but is considered by the jury only in assessing damages.

The question thus presented here is whether the evidence as to the actions of the decedent, presents a question of fact to be determined by the jury, or does such evidence, standing alone and taken with all its inferences and deductions most favorable to the plaintiff fail to show due care and caution on the part of the plaintiff's intestate.

The driver of the car admits that he saw the cross-arms at the crossing when his car was about 200 feet from the railroad. He estimates his speed at 20 miles per hour. The pictures introduced show that for about 100 feet or more the gravel road is curving to the left and to the crossing. These same pictures show some weeds and foliage which obstructs a view of the rails, but the testimony shows the diesel engine stood fourteen feet above the rails. There are some trees on the right of the highway which obstruct the view of

(1930)

Informant: Henry A. Goldstein, New York, N.Y., 101.

The informant states a number of cases which are not avail-

able to the defendant in this case, for the reason that they are under the Federal Employer's Liability Act. Under that act, "contributory negligence" is not a defense, but is considered by the jury only in assessing damages.

The question was presented here as to whether the defendant as to the actions of the defendant, presents a question of fact to be determined by the jury, or does such evidence, standing alone and taken with all the inferences and deductions most favorable to the defendant, fail to raise the issue and question on the part of the defendant's interest.

The driver of the car stated that he saw the cross-trees at the crossing when his car was about 200 feet from the railroad. He estimated his speed at 20 miles per hour. The witness testified that about 100 feet or more the travel road is directed to the left and to the crossing. There were pictures and some weeds and foliage which obstructs a view of the rails, but the defendant shows the detail engine about 100 feet above the rails. There are some trees on the right of the highway which obstruct the view of

the tracks to the north from about 200 feet north of the crossing. The husband and driver, Ralph Hatcher testified his wife was sitting in the middle of the front seat and looking out the front of the car. The little girl, Joan Hatcher testified her mother was in the middle of the front seat and looking out the front. The only other eyewitness, the six year old boy, Gordon Hatcher, testified as to his mother's position in the car but did not testify in regard to her looking out the front of the car. It was a warm, sunshiny day, and the accident happened about 3:30 p.m. The testimony of Ralph Hatcher and the boy Gordon Hatcher was to the effect that the decedent Nina Mae Hatcher was talking to her mother-in-law as the car approached the crossing. There is no testimony that anything was said by the decedent or anyone else to the driver of the car about the manner in which he was operating the automobile or in warning in any way.

If the driver of the car Ralph Hatcher saw the cross-arm signs of the crossing for about 200 feet from the crossing it must be assumed that the decedent, Nina Mae Hatcher, looking out the front of the car also saw these signs, and knew the car was approaching a railroad crossing. She was talking to her mother-in-law about general things. There is nothing in the record to show that she said anything or did anything to warn the driver that they were approaching a railroad

[illegible]

crossing. In fact, the only testimony of the three eye-witnesses, as to the conduct of the decedent is that she was talking to her mother-in-law and looking out the front of the car. There is nothing in the record to show any interference with her view of the crossing, the signs thereon, and for at least 200 feet or more north of the crossing. There is nothing in the record to show any distraction of her attention. Where there are eyewitnesses to the happening, no presumptions are allowed, and the testimony of the eyewitnesses is the only evidence permitted. Here, there is no question of fact involved and the testimony of the husband and driver, Ralph Hatcher, and the two children must be taken as true. Taking into consideration all of these facts, as presented by the evidence, was there any evidence, standing alone, and taken with all its inferences and deductions most favorable to the plaintiff, which would tend to show that the plaintiff's intestate was in the exercise of due care and caution for her own safety? It is the opinion of this court that there was none. The matter thus presented is a matter of law and not of fact. And being a matter of law it is the duty of this court to determine the question of contributory negligence. It is not enough that the railroad may have been negligent, in that it failed to blow the whistle or failed to ring the bell. It may have been negligent in

crossing. In fact, the only testimony of the force of the
as to the content of the statement is that she was talking to her
mother-in-law and looking out the front of the car. There is
nothing in the record to show any interference with her view of the
crossing, the sign tower, and for as long as 200 feet or more
north of the crossing. There is nothing in the record to show any
distraction of her attention. There is no question as to the
reputation, no question as to the ability, and the condition of the
witnesses is the only evidence permitted. Now, there is the question
of fact involved not the testimony of the witness and driver, but
rather, and the two witnesses must be taken as true. What is the
consideration of all of these facts, as presented by the evidence, was
there any evidence, admitted, and taken with all the inferences
and deductions that are to be made, which would justify
them that the plaintiff's insurance was in the position of her care and
caution for her own safety. It is the opinion of this court that there
was none. The matter was presented in a matter of law and not of fact.
And before a matter of law it is the duty of this court to determine
the question of contributory negligence. It is not enough that the
railroad may have been negligent, in that it failed to blow the
whistle or failed to ring the bell. It may have been negligent in

permitting the weeds and bushes to grow upon its right-of-way to such an extent that the view of the tracks was obstructed. The plaintiff's intestate must also have exercised due care and caution for her own safety, and according to this record she failed to do anything or say anything in the exercise of due care, although she could see the crossing, was or must have been conscious of the fact that the car was approaching a railroad crossing, and as a normal person recognized the inherent danger at such a point.

As has been said many times, it is difficult to make a hard and fast rule that will apply to all cases. Each case must rest upon its own facts. But where the facts are undisputed and without question, and where they show a total lack of any act on the part of the plaintiff's intestate to have been in the exercise of due care and caution for her own safety, there is only one conclusion and that is that the plaintiff failed to prove an essential and vital part of the plaintiff's case, namely that the decedent was in the exercise of due care and caution for her own safety at the time of the accident. This being so determined, the circuit court was in error in refusing to direct a verdict in favor of defendant, and the cause is reversed for that error.

Reversed.

Boeth, P. J. and Carroll, J., concur.

permitting the weeds and bushes to grow upon the right-of-way to such an extent that the view of the track was obstructed. The plaintiff's intestate must also have exercised due care and caution for her own safety, and according to this record she failed to do anything or say anything in the exercise of due care, although she could see the crossing, was or must have been conscious of the fact that the car was approaching a railroad crossing, and as a normal person recognized the inherent danger as such a point.

As has been said many times, it is difficult to make a rule and a rule that will apply to all cases. Each case must rest upon its own facts. But where the facts are undisputed and without question, and where they show a total lack of any act on the part of the plaintiff's intestate to have been in the exercise of due care and caution for her own safety, there is only one conclusion and that is that the plaintiff failed to prove an essential and vital part of the plaintiff's case, namely that the decedent was in the exercise of due care and caution for her own safety at the time of the accident. This being so determined, the circuit court was in error in refusing to direct a verdict in favor of defendant, and the cause is reversed for that error.

Reversed.

North, J. I. and Carroll, J., concur.

554
 Mrs. William J. Smith
 Spiritualists, Inc. v. Klemm
 Per Mr. Smith
 3/18/59

A

STATE OF ILLINOIS
 APPELLATE COURT
 THIRD DISTRICT

20 I.A. 482

General No. 10200

Agenda No. 15

Max R. Klemm, Administrator with Will Annexed
 of the Estate of Howard L. Maxon, Deceased,

Plaintiff-Appellant,

vs.

The Trustees of the American Red Cross,
 The Board of Trustees of Carroll College,
 Trustees of the Salvation Army of America,
 Trustees of the Indiana Association of
 Spiritualists, Inc., The Anderson Banking
 Co., Helen Richardson, Lois E. Maxon, Jessie
 M. Maxon, Rex H. Maxon, Harold Grundy, and
 Unknown Owners,

Defendants.

Appeal from
 Circuit Court
 Christian County.

Trustees of the Indiana Association of
 Spiritualists, Inc., and Anderson Banking
 Company,

Defendants-Appellees

REYNOLDS, J.

This is an appeal from an order of the Circuit Court of Christian
 County, Illinois, dismissing a complaint to construe the will of
 Howard L. Maxon, deceased, and for the appointment of a trustee to
 sell the real estate of said decedent.

Howard L. Maxon, died in Florida on March 30, 1957, leaving a

Abstract

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Personal files of the respondent, dated 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627,

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1. The purpose of the present study is to determine the effect of the use of the word "and" in the title of a paper on the number of citations it receives.

27.4 4.1 30.5

to hold local elections and to elect
judges and magistrates, etc., etc.

1944-1945

1. 372755

It is in accord with the order of the circuit court of Missouri to issue the writ of habeas corpus.

He is a real estate of said decedent.

William L. Taxon, deceased, and for the appointment of a trustee to

County, Illinois, claiming a complaint to continue the will of

Lowell, Mass., Sept. 25, 1891.

will with the usual provision for the prompt payment of his just debts and funeral expenses. The will left all the rest of his estate to four organizations, as follows:- Twenty-five per cent. to the Trustees of the American Red Cross, twenty per cent. to the Trustees of Carroll College, of Waukesha, Wisconsin, twenty-five per cent. to the Trustees of the Salvation Army of America and the remaining thirty per cent. to the Indiana Association of Spiritualists Inc., of Chesterfield, Indiana. The will named the Anderson Banking Company, of Anderson, Indiana, as executor and testamentary trustee.

Paragraph Four (4) of the will directed the sale of his farm of 300 acres in Christian County, Illinois, in the following language: "I further direct that my farm of approximately 300 acres situated in Christian County, Illinois (County seat Taylorville) be sold either at private or public sale (for legal description see abstract now in keeping at Anderson Banking Company)."

The will was probated in Indiana, and the defendant Anderson Banking Company qualified as executor. Later, it was admitted to probate in the County Court of Christian County, Illinois, as a foreign will and letters of administration with will annexed were issued to the plaintiff Max R. Klemm. After filing inventory including the 300 acres of land, and after the claim date had passed, the plaintiff filed his complaint in the Circuit Court to construe the will and appoint a trustee, naming the Indiana executor, the four beneficiaries,

will with the usual provision for the prompt payment of all just debts and funeral expenses. The will left all the rest of his estate to four organizations, as follows: - Twenty per cent. to the Trustees of the American Red Cross, twenty per cent. to the Trustees of the College of William and Mary, twenty per cent. to the Trustees of the Division of the American Red Cross, and the remaining thirty per cent. to the Indiana Association of Agriculturalists, of Chesterton, Indiana. The will named the American Banking Company, of Indianapolis, as executor and temporary trustee.

Paragraph 10 of the will directed the sale of the land of 200 acres in Christian County, Illinois, in the following language: "I further direct that my land of approximately 200 acres situated in Christian County, Illinois (County West Township) as sold either as private or public land (for legal description see exhibit now in keeping of Indiana Banking Company)."

The will was probated in Indiana, and the defendant Indiana Banking Company qualified as executor. Later, it was admitted to probate in the County Court of Christian County, Illinois, as a foreign will and father of administration with will annexed were issued to the executor and K. C. Green, after filing inventory including the 200 acres of land, and after the date had passed, the plaintiff filed his complaint in the Circuit Court to contest the will and appoint a trustee, naming the Illinois Association, the four beneficiaries,

the heirs of the decedent and the farm tenants as defendants.

The Indiana executor, Anderson Banking Company, filed its motion to dismiss the complaint, and for grounds therefor, set up that the only assets of the estate in Illinois was corn mortgaged to the Commodity Credit Corporation and the 300 acres of land; that there was no ambiguity in the will; that the administrator in Illinois was not required to convert the real estate into money and had no duties in connection with the real estate; that the Illinois administrator had no right or capacity to apply to a court of equity for such relief; and that he had been advised that all court and other costs would be paid out of personal property in Indiana.

The beneficiary, the Trustees of Indiana Association of Spiritualists, Inc., filed their motion to dismiss the complaint, setting forth that there was no ambiguity in the will; that the duties of an administrator with will annexed do not involve the real estate; that under the law the administrator with will annexed is not required to convert the real estate, namely the 300 acre farm, into money in order to make distribution thereof; that as such administrator with will annexed he had no right or capacity to apply to a court of equity for a construction of the will and the appointment of a trustee to carry out the provisions thereof; that he had been advised by the Indiana executor that any costs incurred in Illinois would be paid from the personal property in Indiana.

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The following statement, however, is not correct, that the

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The other beneficiaries, the heirs and the tenant filed no pleadings in the cause and the complaint was taken as confessed against them by order of the court. One Scott Hoover, a member of the Christian County Circuit Court Bar was appointed as Guardian Ad Litem and Trustee Ad Litem. The court then took the cause under advisement, and on December 3, 1957, allowed the motion to dismiss and ordered that the suit be dismissed. The order of the court dismissing the complaint gives no reason for the dismissal.

Originally the appeal was made to the Supreme Court of Illinois, and on motion of the defendants-appellees, the Supreme Court held by its order of June 17, 1958, that the cause had been wrongfully appealed to that court and ordered the appeal transferred to this court.

The plaintiff in his appeal raises eight points. 1. That the

The other beneficiaries, the heirs and the estate filed no objections to the cause and the complaint was taken as confessed against them by order of the court. The court, however,

a member of the Christian County Circuit Court was appointed as guardian of the heirs and trustees of the estate. The court then took the cause under advisement, and on December 3, 1927, allowed the motion to dismiss and ordered that the suit be dismissed. The order of the court dismissing the complaint gives no reason for the dismissal.

Originally the appeal was made to the Supreme Court of Illinois, and on motion of the defendant-appellees, the Supreme Court held by its order of June 17, 1928, that the cause had been wrongfully appealed to that court and ordered the appeal transferred to this court.

The plaintiff in his appeal raises eight points. 1. That the

motions to strike raised new matters of fact, which is contrary to the law as set forth in Section 45, Chapter 110, Illinois Revised Statutes, and that the heirs are proper parties, since the will may be contested up to nine months of the admission to probate.

2. That the named executor, Anderson Banking Company, of Anderson, Indiana, is not qualified to act as executor of the will in Illinois.

3. The power to sell real estate without specifying who is to sell, does not confer the power of sale on the Indiana executor or any

other person. 4. The plaintiff, as administrator with will annexed, has preference in administering all of the estate in Illinois.

5. The administrator with will annexed has the right to apply to the court for a construction of the will and the appointment of trustees

to sell and carry out the provisions of the will. 6. That the

plaintiff, the Illinois administrator with will annexed is a proper plaintiff in the suit. 7. An executor does not have right to possession

of real estate merely because he has the power of sale. 8. The county court has no jurisdiction over the leasing of the lands of a decedent.

The first point raised, namely that the motions to strike allege new matters, is based upon the language of Section 45, Chapter 110, Illinois Revised Statutes, which provides that a motion with respect to pleadings shall point out specifically the defects complained of, and shall ask for appropriate relief. While it is true that the motions do allege new matters, the plaintiff did nothing in the way of motion

The first point raised, namely that the motion is within Illinois, is based upon the language of Section 12, Chapter 110, Illinois Revised Statutes, which provides that a motion for judgment shall be filed in the court in which the cause is pending, and shall not be taken out of the court in which it is pending. It is true that the motion is within Illinois, but it is not within the court in which the cause is pending, and therefore it is not within the scope of the statute.

to strike the new matter, and applying the same rule of liberalization in pleading and appeal we have previously noted, we hold that this in itself is not reversible error. The second matter raised in this point is that the heirs are proper parties, but the heirs did not appeal, plead or demur, and default was entered against them. Consequently, assuming it to be correct, it is not applicable here.

The second point cannot be disputed. A non-resident cannot qualify as an executor or administrator in Illinois. Admitting that to be the law, this court fails to see the connection as to the points at issue in this cause, since apparently the Indiana executor recognized that fact and had the plaintiff appointed as administrator with will annexed.

The third point raised by the plaintiff, is that the power in the will to sell real estate, without specifying who is to sell, does not in itself confer a power of sale on the Indiana executor or any other person. In support of the plaintiff's position on this point, the plaintiff cites 21 American Jurisprudence, 772, Sec. 695, which says: "A direction in a will to sell land without specifying who is to exercise the power does not of itself confer on the person appointed as executor the power to sell. The criterion in such cases for the determination of the existence in the executor of implied power to sell is whether the fund arising from the sale is distributable by him. In other words, where the proceeds of the sale are to be applied by the executor, a power to

to strike the new bill, and during the same time the bill is
in place and we have previously noted in this bill
in itself is not responsible error, the second bill is this
point to be the same as the first, but the bill is not
place to be the same as the first, but the bill is not
assuming it to be correct, it is not responsible for.

The second bill cannot be responsible, it is not responsible
quality as an executor or administrator in himself, but to
as the law, this bill is to be the executor of the bill of
there is no error, since the bill is not responsible for
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does not of itself confer on the person appointed as executor the
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sell will be implied in his favor from the direction in the will to sell, which does not state who is to make the sale." Assuming that the above quoted section correctly states the law, we fail to see how it affects the rights of the plaintiff herein, or supports his appeal. If there is no power in the Indiana executor to sell, there is no power in the Illinois administrator with will annexed to sell.

The fourth point in the plaintiff's appeal is that the plaintiff, as administrator with will annexed, has preference in administering all of the estate of the decedent in Illinois. Section 232, Chapter 3, Illinois Revised Statutes cited in support of this point is merely a general statement of law, namely, "The executor or administrator with will annexed shall administer all of the testate and intestate estate of the decedent." Nothing is said about preference. Section 428 of the same chapter of the Statutes, only recites the substitution of the administrator in this state for a foreign administrator or executor. Again there is nothing in the section establishing a preference.

The fifth and sixth points raised by the plaintiff may well be considered together. The fifth point is that the administrator with will annexed, under which will the executor is required to convert land into money and make distribution, can apply to the court for a construction of the will and the appointment of a trustee to sell and carry out provisions which do not devolve strictly upon him as such

will still be implied in his favor from the direction in the will to
sell, which does not state who is to make the sale. Assuming that
the above stated section correctly states the law, we will to see how
it affects the rights in the Illinois estate in favor of the widow.
If there is no power in the Illinois executor to sell, there is no
power in the Illinois administrator with will annexed to sell.
The fourth point in the plaintiff's case is that the plaintiff,
as administrator with will annexed, has no authority to execute the
will in the estate of the deceased in Illinois. Section 122, Chapter
3, Illinois revised statutes states in support of this point in large
a general statement of law, namely, "The executor or administrator
with will annexed shall administer all of the estate and interests
of the deceased." Nothing is said about executor. Section
123 of the same chapter of the statutes, only recites the substitution
of the administrator in this state for a foreign administrator or
executor. Now, there is nothing in the section establishing a pre-
ference.
The fifth and sixth points raised by the plaintiff are well re-
considered together. The fifth point is that the administrator with
will annexed, under which all the assets in the estate are controlled
and into which they are distributed, was only to the court for a
construction of the will and the appointment of the executor to sell and
carry out provisions which he has devised entirely upon his own mind.

administrator, and the sixth point is that the Illinois administrator with will annexed is a proper plaintiff in the suit. In support of this contention the plaintiff cites Kolb v. Landes, 277 Ill. 440; Frackelton v. Masters, 249 Ill. 30; Penn v. Fogler, 132 Ill. 75; Stoff v. McGinn, 178 Ill. 46; Wenner v. Thornton, 98 Ill. 188; Nicoll v. Scott, 99 Ill. 529 and Bigelow v. Gady, 171 Ill. 229. In the Kolb v. Landes case the Court held that where there is a residuary clause directing the executor to convert into money any land not disposed of by the will, the administrator with will annexed may file a bill to have the will construed to determine if there is any real estate falling into the residuary clause, and if the court finds there is such real estate the administrator is entitled to a construction of any portion of the will necessary for a proper administration of the estate, but if the court finds there is no such real estate then the bill must be dismissed. In that case the bill was dismissed. In the Frackelton v. Masters case, the testator nominated and appointed his sons as joint executors, but they declined and Frackelton was appointed administrator with the will annexed. In that case the will directed the executors to sell the remainder of the estate not specifically devised, and part of the proceeds of the sale of real estate was to be set up as a trust fund for minor grandchildren and the remainder of the funds so realized to be paid to his children. In that case the will imposed a duty upon the executors and upon their refusal to act as executors, upon the administrator with will annexed.

administrator, and the state policy is that the administrator
with will annexed is a proper plaintiff in the estate. In support of
this contention the administrator cites Wright v. Wright, 171 Ill. 181;
Wright v. Wright, 171 Ill. 181; Wright v. Wright, 171 Ill. 181;
Wright v. Wright, 171 Ill. 181; Wright v. Wright, 171 Ill. 181;
90 Ill. 232 and Wright v. Wright, 171 Ill. 181. In the latter case
the court held that where there is a residuary clause in the will,
executor to carry out the will, and not the administrator, is the proper
party to carry out the will. This is the rule in this state. The
contention to establish it here is not sustained. It is the
residuary clause, and if the court finds there is such a clause
the administrator is entitled to a declaration of the validity of the
will necessary for a proper administration of the estate, and if the
court finds there is no such clause the will must be dismissed.
In that case the bill was dismissed, and the administrator's
the executor named and appeared his name in joint answer, but they
declined and Pickelton was appointed administrator and the will annexed.
In that case the will directed the executor to sell the remainder of the
estate not specifically devised, and it is the intention of the will
that estate was to be set up as a trust for the benefit of the children,
and the remainder of the estate was to be paid to the children.
In that case the will imposed a duty upon the executor and upon their
refusal to act as executor, upon the administrator with will annexed.

The case held that the appointment of a trustee to sell the real estate was proper. The Penn v. Fogler case, deals only with bank stock, which is personalty, but that court did hold that the administrator with will annexed had a right to apply to a court of equity for the appointment of a trustee to carry out the provisions of the will which do not strictly devolve upon him as such administrator. The case of Stoff v. McGinn, 178 Ill. 46, also states the right of the administrator with will annexed to apply to a court of equity for construction of the will and for the appointment of a trustee to sell real estate. That case goes further and holds that an administrator could not make a sale by virtue of the will, but that such power is connected with a personal trust and confidence reposed by the testator in the executor, and without the aid of the court the administrator with will annexed could not sell the lands. The other cases hold to similar views. The law of these cases would make the plaintiff, Max R. Klemm, the Illinois Administrator with will annexed a proper plaintiff for such purpose.

In applying these last cited cases to this cause, it must be remembered that under administration of estates, an administrator does not have any authority to sell real estate of an estate, except where there is insufficient personal estate to pay expenses of administration, claims against the estate, or legacies expressly or impliedly charged by the decedent's will upon his real estate, Section 379, Chapter 3, Illinois Revised Statutes. Real estate descends to and vests in the

the case held that the appointment of a trustee to sell the real estate was proper. The case of Foster, deals only with bank stock, which is personality, but that court did hold that the administrator with will annexed had a right to apply to a court of equity for the appointment of a trustee to carry out the provisions of the will which do not strictly devolve upon him as such administrator. The case of Boyle v. Boyle, 17 Ill. 2d, also states the right of the administrator with will annexed to apply to a court of equity for construction of the will and for the appointment of a trustee to sell real estate. That case goes further and holds that an administrator would not take a sale by virtue of the will, but that such power is connected with a personal trust and confidence imposed by the testator in the executor, and without the aid of the court the administrator with will annexed could not sell the lands. The other cases held to similar views. The law of these cases would make the plaintiff, Ex R. E. Egan, the Illinois administrator with will annexed a proper plaintiff for such purposes.

In applying these laws to the case, it must be remembered that under administration of estates, an administrator does not have any authority to sell real estate of an estate, except where there is insufficient personal estate to pay expenses of administration, claims against the estate, or debts expressly or impliedly charged by the decedent's will upon his real estate, Section 376, Chapter 6, Illinois Revised Statutes. Real estate descends to and vests in the

heirs upon the death of the ancestor subject to the payment of decedent's debts in the mode prescribed by law, and an administrator takes no title thereto either real or equitable, although he may upon a deficiency of personal assets, apply to the court for a decree to sell real estate for the payment of decedent's debts. In re Baker's Estate, 315 Ill. App. 366. An administrator or executor cannot sell real estate owned by decedent at death except in the mode pointed out by Statute. In re Scheribel's Estate, 340 Ill. App. 238. Here there were no debts unpaid, the personal estate was sufficient to pay all debts, and the costs of administration had been assumed by the Indiana executor. This would leave only legacies expressly or impliedly charged by the decedent's will upon his real estate, as a basis for plaintiff's bill of complaint, unless we can hold that the directions in paragraph four of the will, creates a duty on the part of the executor or administrator to sell the real estate. While the will bequeaths to the named beneficiaries, the balance of the estate, including the real estate in question, there is no positive direction in the will that the real estate be charged with the bequests as required in the Statute. This would leave only the question as to whether the will created a duty on the part of the executor or administrator to sell this real estate and convert it into money for the payment of the respective shares of the estate set forth in the will. Assuming that the will, by the terms of Paragraph Four does create such a duty on the part of the executor or administrator

with will annexed, then we come to the vital questions in this whole matter, namely, is this the duty of the Indiana executor, and if so, does it have the power to sell real estate in Illinois, or, because this land is in Illinois, does this duty devolve upon the administrator with will annexed in Illinois? Or, stated another way, since there were no unpaid debts, and the personal estate was sufficient to pay all debts and costs of administration, did the will pass title to the four beneficiaries and they could determine when and upon what terms the real estate should be sold?

Section 425 of Chapter 3, Illinois Revised Statutes is as follows:-

"When any person residing outside of this state is appointed in any other state, territory, or country executor of the will or administrator of the estate of any decedent who at the time of his death owned real estate or any interest therein within this state and letters testamentary or of administration have not been granted on the estate of the decedent in this state, the person so appointed may file his petition in the circuit or probate court of the county in which the real estate or the greater part thereof may lie, for the sale or mortgage of the real estate or interest therein for any of the purposes for which a resident executor or administrator may sell or mortgage under this Act, or for such other purposes as the court which issued letters to such person may direct. The circuit or probate court of this state is authorized to grant the prayer of the petition." By the terms of this

with will annexed, then no case for the vital questions in this whole matter, namely, is this the debt of the Indiana executor, and if so, does it have the power to call real estate in Illinois, or, because this law is in Illinois, does this debt devolve upon the administrator when will annexed in Illinois? or, stated another way, since there were no unpaid debts, and the personal estate was sufficient to pay all debts and costs of administration, but the will gave title to the real estate and the court decreed that when and upon what terms the real estate should be sold.

Section 3 of Chapter 3, Illinois Revised Statutes is as follows:-
When any person residing outside of this state is appointed in any other state, territory, or country executor of the will or administrator of the estate of any decedent who at the time of his death owned real estate or any interest therein within this state and letters testamentary or of administration have not been granted on the estate of the decedent in this state, the person so appointed may file his petition in the circuit or probate court of the county in which the real estate or the greater part thereof may lie, for the sale or conveyance of the real estate or interest therein for any of the purposes for which a testament executor or administrator may sell or mortgage under this act, or for such other purposes as the court which issued letters is authorized to grant the prayer of the petition, by the terms of this

section of the statute, if there had been administration in Illinois, the Indiana executor had the right to apply to the circuit or probate court of Christian County, for authority to sell this real estate. However, this authority would be limited to those acts that a resident Illinois executor or administrator might do, to sell real estate of a decedent. Here, however, the public administrator for Christian County, the plaintiff herein, had been appointed and qualified as administrator with will annexed. This would seem to terminate the authority of the Indiana executor so far as the sale of the real estate is concerned, and vest it in the Illinois administrator, if the will by its directions for sale of the 300 acres of real estate in Illinois, imposed a duty to sell. The case of In re Estate of Zverina, 323 Ill. App. 585, is somewhat similar to this case. In that case, Zverina died intestate at Fort Wayne, Indiana. Letters of administration were issued by the Superior Court of Allen County, Indiana, and the administrators qualified and entered upon their duties as such administrators. Zverina owned real estate in Chicago, and John T. Dempsey, public administrator of Cook County, filed his petition for administration of the estate and he was appointed as such administrator. Three claims against the estate of Zverina were allowed by the Cook County Probate Court. The administrators of Indiana, filed their petition in Probate Court of Cook County, asking that Dempsey be discharged as such administrator, and in that case, the court in referring to

action of the estate, it does not seem to be in Illinois,
the Illinois executor has the right to apply to the circuit or probate
court of Cook County, for authority to sell this real estate.
However, this authority would be limited to those facts that a resident
Illinois executor or administrator might be, to sell real estate of
a decedent. Here, however, the public administrator for Cook County,
the public administrator, has been appointed and qualified as
administrator with will annexed. This would seem to authorize the
authority of the Illinois executor as far as the sale of the real estate
is concerned, and that is as the Illinois administrator, if the will
by the disposition for sale of the real estate of real estate in Illinois,
it seems a duty to sell. The case of In re Estate of Taylor, 190 Ill.
App. 585, is somewhat similar to this case. In that case, Taylor
was intestate as to his real estate. Letters of administration were
granted by the Probate Court of Cook County, Illinois, and the admin-
istrator qualified and assumed upon their duties as such administrator.
Taylor's estate was sold in Illinois, and Cook County, Illinois.
The administrator of Cook County, Illinois, filed his petition for adminis-
tration of the estate and he was appointed as such administrator.
Three claims against the estate of Taylor were allowed by the
Cook County Probate Court. The administrator of Illinois, filed his
petition in Probate Court of Cook County, asking Cook County to dis-
charge as such administrator, and in that case, the court in referring to

Section 425 of the Probate Act, said: "It will be noted that by this section a non-resident administrator of a non-resident decedent is not authorized to take any action with reference to real estate owned by the decedent in Illinois, except where letters of administration have not been granted of the estate in this state. By Section 274 of the Probate Act (Ill. Rev. Stat. 1943, Ch. 3 par. 428; Jones Ill. Stats. Ann. 110.525) it is provided that if a non-resident administrator comes into Illinois before the appointment of an Illinois administrator, and petitions for leave to sell real estate of the non-resident decedent, his authority to act is limited and shall continue only until such time as a resident administrator is appointed. And upon motion the resident administrator shall be substituted as petitioner." This case has not been overruled or modified.

This court must therefore hold, that upon the appointment of the plaintiff as administrator with will annexed in Christian County, the authority of the Indiana executor insofar as the sale of the land of the decedent in Illinois ceased, and any authority the Indiana executor may have had, prior to the appointment of the plaintiff, became the authority of the plaintiff. We must further hold that the plaintiff, the resident administrator is a proper plaintiff in this cause. We must further hold that there is a certain amount of ambiguity in the will as to who should sell the real estate, and that the complaint for construction of the will was proper. That the title did not pass

Section 42 of the Probate Act, which reads: "It will be noted that by this section a non-resident administrator of a non-resident decedent is not authorized to take any action with reference to real estate owned by the decedent in Illinois, except where letters of administration have not been granted of the estate in this state. By Section 43 of the Probate Act (Ill. Rev. Stat. 1903, Ch. 3, Sec. 43; Jones Ill. State, Vol. 110, 111) it is provided that if a non-resident administrator comes into Illinois before the appointment of an Illinois administrator, and petition for leave to sell real estate of the non-resident decedent, his authority to act is limited and small portions only until such time as a resident administrator is appointed. And upon section 44, resident administrator shall be appointed as provided. This case was not been overruled or modified.

This court must therefore hold, that upon the appointment of the plaintiff as administrator with will annexed in Christian County, the authority of the Indiana executor insofar as the sale of the land of the decedent in Illinois concerned, and any authority the Indiana executor may have had, prior to the appointment of the plaintiff, becomes the authority of the plaintiff. We must further hold that the plaintiff, the resident administrator is a proper plaintiff in this cause. We must further hold that there is a certain amount of real estate in the will as to who should sell the real estate, and that the court has the construction of the will was proper. That the title did not pass

to the four beneficiaries, but that it remained for the executor in Indiana, or the administrator in Illinois to take such steps as were necessary to convert the land into cash and carry out the terms of the will so far as distribution among the beneficiaries.

It is not necessary to discuss the other points raised by the plaintiff in his appeal.

The motions of the defendants, taken with the case from the Supreme Court are overruled.

The motion to dismiss should have been overruled and it was error not to do so. The cause is reversed and remanded with directions to overrule the motion to dismiss the complaint and to proceed in accordance with the views expressed herein.

Reversed and remanded with directions.

Roeth, P. J. and Carroll, J., concur.

to the four beneficiaries, but that it remained for the executor in Indiana, or the administrator in Illinois to take such steps as were necessary to convert the land into cash and carry out the terms of the will so far as distribution among the beneficiaries.

It is not necessary to discuss the other points raised by the plaintiff in his appeal.

The motions of the defendants, taken with the case from the Supreme Court are overruled.

The motion to dismiss should have been overruled and the prayer of the complaint granted.

Reversed and remanded with directions.

Boeth, P. J. and Carroll, J., concur.

to the fact that it is not necessary for the executor
to make a list of the assets of the decedent, but that it is
sufficient for the executor to make a list of the assets
which are necessary to convert the land into cash and carry out the
terms of the will as far as distribution among the beneficiaries.
It is not necessary to discuss the other points raised by the
plaintiff in his appeal.
The motion of the defendant, taken with the case from the
Supreme Court are overruled.
The motion to dismiss should have been granted and the
prayer of the complaint granted.
Reversed and remanded with directions.

ROETH, P. J. and GARROLD, J., concur.

47200

GEORGE BUTKOVICH,

Appellant,

v.

MARTIN MALYSIAK and NELLIE MALYSIAK,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

201A.598²⁵1

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff, a cement and masonry contractor, filed a complaint to foreclose a mechanic's lien for labor performed and material furnished in making certain improvements on the home of defendants located at 4606 Deyo Avenue, Congress Park, Illinois. Defendants filed their answer, and a countercomplaint at law asking damages for alleged defective performance of the work. Issue was joined upon the filing of an answer by plaintiff, and thereafter the matter was referred to a master in chancery. Subsequently defendants obtained an order severing the chancery complaint from the counterclaim at law, and enjoining the proceedings in chancery until a final determination of the countercomplaint at law, and an additional order transferring the cause from the chancery to the law side of the court for trial, on the ground that defendants would otherwise be deprived of their right to trial by jury. Trial of the issues under the countercomplaint resulted in a verdict in favor of defendants in the amount of \$3800.00. After his post-trial motions were overruled, judgment was entered on the verdict and plaintiff appealed.

The essential facts disclose that defendants, owners of a frame bungalow, entered into a written contract with plaintiff wherein he agreed to construct a foundation and concrete basement floor under defendant's raised house for the stipulated sum of \$1700.00, of which \$1000.00 was paid, either when the contract was signed or after the foundation was laid. Plaintiff was to allow sufficient space around the foundation for brick-veneering the exterior of the building at a later date, when defendants would be financially able to pay therefor. When the foundation was completed and the building lowered thereon, defendants complained that there was less space on one side of the building than on the other, and that in general the job had not been properly done. In the light of these circumstances, plaintiff then offered to do the brick veneering at the special and reduced price of \$1200.00, whereupon another agreement was entered into, by the terms of which plaintiff undertook to brick-veneer the exterior of the building. Later a third agreement was made for some exterior additional work such as the construction of front stairs, a rear porch, windows, etc., for which defendants were to pay \$522.00.

When the job was completed, plaintiff requested payment of the balance due him. Defendants complained that the concrete basement floor had cracked, that the foundation contained numerous cracks, that water was leaking into the basement, that the back porch leaked, that the wood-supporting pillars in the basement were cracked, and that the job as a whole was not at all satisfactory. An additional payment of \$1500.00 was made at the time,

with the understanding that plaintiff would complete the work in a first-class and satisfactory manner, and that he would then be paid the balance. The memorandum regarding the completion of the work was contained in a written receipt signed by plaintiff. The countercomplaint alleged that plaintiff failed to complete the job as agreed, and that he did not cure or repair any of the defects.

As ground for reversal it is urged primarily that the verdict was against the manifest weight of the evidence. The record consists of over 1000 pages. Approximately fifteen witnesses testified, pro and con, as to the improvements, the materials used, the claimed defects and the cost of curing them. Much of the evidence is conflicting, but there is no dispute as to the various complaints made by defendants of defects in the workmanship and of the faulty material used, nor of the fact that cracks in the foundation wall, in the basement floor, in the pillars and in the brick veneer existed. Plaintiff admitted on trial that he had agreed to complete the job in a satisfactory manner after defendants complained of various defects. He testified that the foundation was "green" when he "stripped" it, and when asked to explain the meaning of the phrase "cement being green" he said that "it is not set right exactly." On being asked whether, in the light of his experience, he would consider it proper to set a building the size of defendants' home on a foundation that had been poured one day previously, he stated that, in general, he would not do so because "you couldn't get a building like this

up in one day," but it was his position that "nothing would happen to the foundation" if a building were lowered on it the following day, although he added that twenty-four to forty-eight hours are required to "cure" cement and that concrete does not reach its maximum strength for a month after pouring. He admitted that he had seen a crack along the entire center of the basement floor but he stated that it was not present immediately following completion of the job; he also admitted that there were cracks in the foundation walls, the pillars and the brick veneer. No evidence was offered by plaintiff as to the manner in which these defects could be cured, but Kenneth Teuscher, a construction engineer with thirty years' experience, called as a witness by defendants, testified that the defects in the concrete work could not be remedied, that the foundation and floor would have to be removed and repoured, and that a fair and reasonable charge for such work would be approximately \$7200.00. All the evidence pertaining to the controverted issues were submitted to the jury, and their findings of fact should not be disturbed as being against the manifest weight of the evidence, unless an opposite conclusion is clearly evident. The most that can be said on behalf of plaintiff's contention is that there are some disputed questions of fact which the jury were called upon to determine. Numerous decisions in this State enunciate the rule that findings of fact will not be disturbed by the reviewing court unless an opposite conclusion is clearly evident. *Myers v. Krajefsky*, 8 Ill. 2d 322; *Reese v. Laymon*, 2 Ill. 2d 614; *Griggas v. Clauson*, 6 Ill. App. 2d 412; *Olin Industries, Inc. v. Wuellner*, 1 Ill. App. 2d 467.

Plaintiff complains of the refusal to give instructions numbered 14 and 15 relating to damages. The instructions given with reference to computing the measure of damages were substantially correct and covered the law in the case. Under the circumstances we do not think the refusal of the trial court to include plaintiff's instructions No. 14 and No. 15 constituted error. In *Ritter v. Hatteberg*, 14 Ill. App. 2d 548, it was held that it is sufficient if the instructions, taken as a series, correctly advise the jury as to the law applicable to the case.

It is urged by plaintiff that the chancellor erred in staying the proceedings then before the master, pending the trial of the issues under defendants' counterclaim. Paragraph 64 of the Civil Practice Act (Ill. Rev. Stat. 1957, ch. 110, par. 64, sec. 64, subsection (1)) designates the manner and time in which the parties shall file their demand for a jury. In the instant proceeding the demand for a jury trial was filed by defendants within the time specified, and they were therefore entitled to a trial by jury on the issues set forth in their counterclaim. Moreover, the record fails to disclose any objection on the part of plaintiff, at any time, either to the severance of the action or to trial by jury. These alleged errors are assigned here for the first time. It is a familiar rule of law that matters not raised or presented in the trial court cannot be urged for the first time in a court of review. *People ex rel. Lunn v. Chicago Title and Trust Co.*, 409 Ill. 505;

Zimmerman v. Kennedy, 405 Ill. 306; Oliver v. Retirement Bd. of Municipal Employees, 311 Ill. App. 38; Fraser v. Glass, 311 Ill. App. 336; Quinlan & Tyson, Inc. v. National Casualty Co., 311 Ill. App. 369.

Plaintiff feels aggrieved because the court refused to grant his motion for a new trial. Under the Civil Practice Act (Ill. Rev. Stat. 1957, ch. 110, par. 68.1, sec. 68.1, subsection (2)) it is required that a motion for a new trial be presented to the trial court. Failure to file and present such a motion and obtain a ruling thereon constitutes a waiver of the right. Fulford v. O'Connor, 3 Ill. 2d 490; Eckhardt v. Hickman, 2 Ill. 2d 98.

The case was fairly tried. We perceive no reason for reversal; accordingly, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BRYANT and BURKE, JJ., CONCUR.

ABSTRACT ONLY.



47458

JOSEPH KORMAN and PHILLIP KASTEN,)

Appellants,)

v.)

WANEN CATALPA APARTMENTS, INC.,)
a corporation, and CARL P. WANEN,)

Appellees.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

20 I.A. 598 2

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment entered in favor of the defendants denying the plaintiffs' claim for a real estate commission. A jury trial was waived, the case was tried by the court, and the judgment is based on its findings. This appeal is prosecuted upon the theory that the finding of the court was contrary to the manifest weight of the evidence. It therefore becomes incumbent upon us to consider not only what are the essential elements to be proved, but also to evaluate the evidence introduced.

The plaintiffs are Joseph Korman, hereafter referred to as Korman, and Phillip Kasten, hereafter referred to as Kasten. Collectively they will be referred to as the plaintiff or plaintiffs. The defendants are Wanen Catalpa Apartments, Inc., a corporation, hereafter referred to as the corporation, and Carl P. Wanen, hereafter referred to as Wanen. Collectively they will be referred to as the defendant or defendants.

Plaintiffs alleged they were real estate brokers. They introduced into evidence their respective Illinois and Chicago

brokers' licenses for the year in which these transactions took place. No contrary evidence was introduced, and the status of plaintiffs as real estate brokers is clearly established.

Plaintiffs allege they were employed by defendants or one of them to procure a buyer for certain real estate. Defendants deny that allegation. There is no attempt to prove the existence of any written employment contract. This raises at once the legal question as to how may such a contract be determined. It is the law in Illinois that no particular form is required for such a contract, and ordinarily all that is necessary is that the broker act with the consent of the principal, whether such consent is given by a written instrument, orally, or by implication from the conduct of the parties. See generally 5 I. L. P. Brokers section 22, p. 507; O'Dea v. Throm, 250 Ill. App. 577, at 582.

We must therefore look at the conduct of the parties. Korman called defendant Wanen. Wanen granted Korman an appointment. Korman went to see Wanen. They talked in regard to the sale of the premises in question. Korman asked and obtained from Wanen statements relating to the rent of the premises, including the amount that had been paid in advance and held as security for the payment of the rent. Wanen gave Korman statements in regard to the amount that the purchaser would be entitled to as a credit on the mortgage. Wanen gave Korman a statement showing the amounts payable by the owner each month on the building. Wanen caused a statement by his certified public accountant in regard to the financing of that building to be delivered to Korman. All of these statements customarily used in the sale of real estate were

produced at the trial by plaintiffs and introduced into evidence. Korman took Kasten to Wanen's house to meet him and explained to Wanen that Kasten was a co-broker, and together they discussed the questions relating to the sale of the building, and at that meeting an agreement was made that plaintiffs would accept a flat commission of \$10,000 instead of computing it on the sale price.

Subsequently at plaintiffs' request, Wanen made arrangements with the janitor for plaintiffs to show the premises to prospective purchasers, and the building was shown. Later Wanen had numerous telephone conversations with Korman. As a result of said telephone conversations on two occasions Wanen made appointments at his lawyer's office with Korman and people desiring to purchase the property or representatives of such people.

This course of conduct among the parties, which is not disputed, shows that the brokers were acting with the consent of their principal in seeking to obtain a buyer.

There remains the question as to whether plaintiffs have performed services in a manner which would entitle them to the payment of a commission. The statement of claim does not allege that a contract of purchase was signed, but that a buyer ready, willing, and able to buy was procured by plaintiffs. It is the law in Illinois that a real estate broker has earned his commission when he has produced a purchaser or seller, as the case may be, who is ready, willing and able to buy or sell on the terms stated by the principal. Camp v. Hollis, 332 Ill. App.



60, at 66; Pusey v. Varland, 224 Ill. App. 35, at 38. It is not necessary that the principal parties enter into a contract to purchase or sell. Fallen v. Rauguth, 253 Ill. App. 328, at 331. The broker cannot be deprived of his commission by the principal's unwarranted refusal to accept the proposed customer or to consummate the transaction. Purgett v. Weinrank, 219 Ill. App. 28, at 31; Fox v. Ryan, 240 Ill. 391. The test of readiness, willingness, and ability is whether the purchaser has agreed to purchase the property, and whether he has sufficient funds on hand or is able to command the necessary funds with which to complete the purchase. 5 I. L. P. Brokers sections 78, 83, 84, pp. 565, 584.

Plaintiffs produced at the trial as their joint buyers of the premises Mr. Maurice Sampson and Mr. Harry Okun. They both testified that on May 23rd they attended a meeting for the purpose of purchasing the premises. As to their capacity to buy, Mr. Sampson testified that on the date in question he had \$150,000 in government bonds and a substantial bank account in excess of \$5,000. Mr. Okun testified that, in addition to his real estate holdings, he had a bank account of at least \$35,000 on the date in question, and that he and Mr. Sampson had a commitment for a mortgage on the property of approximately \$450,000. Defendants introduced no contrary testimony as to the financial responsibility of the two purchasers. The ability of the purchasers is therefore proved.

Was there an agreement as to the terms of the sale and a compliance therewith?

There is no dispute among the parties that, as between purchaser and seller, this was to be a cash transaction - that is,

the seller was not to grant any credit of any kind or nature in relation to this proceeding. Either the existing mortgage was to be assumed and the purchaser credited with the amount due on that mortgage, or the purchaser was to place a new mortgage on the property, pay off the existing mortgage, and pay the purchaser the balance of the amount in cash. As we have heretofore pointed out, the seller had furnished information in regard to the balance due on the existing mortgage and the credits which had been established for the purpose of paying off the mortgage, all of which were not essential to the completion of the transaction, but which furnished necessary information in case the purchaser was able to and desired to avail himself of the existing mortgage. A commitment for a mortgage had been obtained by the buyers.

The seller also had furnished information in regard to the tenancy of the premises and the amount of money which he held on hand as security for the payment of the later rent. Rent, taxes, insurance, interest, operating expenses such as utilities, and the cost of consumable supplies such as fuel are so generally prorated from the date of delivery of the consideration and of the deed that in the absence of other provisions in preliminary negotiations they may be assumed. As to all these collateral terms there is no contention of disagreement. The only contention is that such terms had not been set forth in writing. As long as the performance is not based on a signed contract, that is not controlling.

The only divergence among the parties as to terms relates to price. Plaintiffs insist that the final price agreed upon was a gross price of \$655,000 and defendants assert that the only price which they had consented to was a net price, which was \$200,000 before the fixed commission was agreed upon and always \$190,000 thereafter. It is to be noted that the conflict in price is not only as to the amount, but as to an entire method of pricing, that is, whether it was a gross or a net price.

The first time that the record discloses that the question of price was mentioned by any of the parties to the litigation is on the occasion when Korman, after making an appointment with Wanen, visited him at Wanen's home and talked about the sale of the building. Korman says that Wanen said that, if he could get \$650,000 for the place, he would sell it. Wanen says that on that occasion he asked \$200,000 net.

The second time that price was mentioned by either of the parties was on the occasion when Korman took Kasten to Wanen's home and introduced him as a co-broker. Kasten testified that on that occasion Wanen first told him the price was \$650,000, and that the mortgage was approximately \$400,000, and that Wanen told him that, if the brokers would take a \$10,000 commission, Wanen would reduce the price to \$640,000. Korman says that Kasten told Wanen that, if they could get the property for sale at \$640,000, they would be willing to take only \$10,000 for their commission. Wanen says that, when he talked with Kasten and Korman on this occasion, he said he wanted \$200,000 net, but that, if the brokers would take \$10,000 for their commission, he would accept \$190,000 net.

The third conversation of any of the parties relating to price is contained in the testimony of Mr. Roiter, who was a defendant's witness. He testified that Kasten showed him the premises, that Korman told him that Wanen wanted \$650,000 for the property, and that he, Roiter, offered \$640,000.

The fourth time price is mentioned is in Korman's testimony that Wanen told him that he had corresponded with the Dollar Savings Bank in New York and the F. H. A., and that they wanted additional money to release the mortgage, and he would therefore have to get an additional \$5,000, or a total of \$645,000. Wanen corroborated the fact that he had written to the bank in New York that held the mortgage, but says that the only price ever quoted was \$200,000 net, or \$190,000 if the commission were only \$10,000.

The fifth time price was mentioned Korman testified that, before the price had been raised to \$645,000, Mr. Roiter left, and he had left a check with his son for \$640,000 to complete the purchase, and after the price was increased to \$645,000 no further dealings with Roiter were held.

The sixth time price was mentioned by any of the parties, Korman testified that he and Kasten showed the building to Maurice Sampson and Harry Okun and priced it to them at \$645,000. In regard to these dealings Mr. Sampson testified that Kasten showed him the building and quoted the price of \$645,000, and Mr. Okun testified that the price at which the building was submitted was \$640,000.

The seventh occasion upon which price was mentioned, Korman testified that Mr. Sampson and Mr. Okun told him to go ahead and make a deal at \$645,000, and he told Wanen that he had an offer for \$645,000, and that Wanen told him that maybe Irving Jacobs,

Wanen's mortgage broker, would want something, and later Wanen advised Korman that the price would be \$650,000 for a deal.

The eighth time price was mentioned, Korman testified that he had talked to Mr. Sampson and Mr. Okun in his office. They had authorized him to make an offer of \$650,000, and he communicated that to Wanen, Wanen told him to make an appointment at Wanen's lawyer's office and to bring in the purchasers.

The ninth time that the record discloses that price was discussed was in fulfillment of the appointment for the parties to meet at Wanen's lawyer's office. Present at that meeting were Korman, Mr. Sampson, Mr. Okun, Wanen and Wanen's lawyer. Korman testified that at that time and place Wanen announced that the price of \$650,000 was not sufficient, and he wanted another \$5,000, and that Korman and Mr. Sampson and Mr. Okun walked out. Mr. Sampson and Mr. Okun both corroborated Korman to the extent that at the meeting in the attorney's office Wanen demanded an additional \$5,000, and that they walked out. Mr. Sampson testified that the price originally mentioned in the lawyer's office was \$645,000, and Mr. Okun said that it was \$640,000. Wanen corroborated that such a meeting took place. He said that he told them the prices had always been \$190,000 net, and he "didn't give no other price for nobody," and that everybody walked out.

The tenth occasion on which there is evidence that the question of price was discussed was when Korman testified that he again talked with Mr. Sampson and Mr. Okun and then called Wanen and told him that now he had an offer for \$655,000, and Wanen had

replied, "This time it's sure. Make the appointment; then go over." Korman then testified that he made the appointment for the next day in Wanen's lawyer's office at 2 o'clock and advised all the parties.

The eleventh time that the record discloses that the question of price was mentioned by any of the parties was at the meeting the next day. There is no dispute that those attending the meeting were Korman, Wanen, Wanen's lawyer, Mr. Sampson and Mr. Okun, and Mr. Meyer Rosen, attorney for Mr. Sampson and Mr. Okun. Four people testified in regard to what transpired at that meeting - Korman, Wanen, Mr. Sampson, and Mr. Okun. Korman testified that Mr. Rosen started to draw up a contract, and he said the price "is now \$655,000, yes." Wanen answered, "Yes." Mr. Sampson's report of the same conversation is that Mr. Rosen asked Wanen what the price of the building was, and Wanen said it was \$655,000. Mr. Rosen asked if the mortgage was \$447,000, and Wanen said, "That is what it is." Mr. Okun's report of this conversation is, "Our lawyer asked Mr. Wanen what the price was. Mr. Wanen said, '\$655,000,' and we agreed to pay \$655,000 for the building." Wanen does not deny that he was asked whether the price was \$655,000, and that he answered, "Yes." Immediately following this conversation, with the same persons present, Korman reports, after preliminary computations were made in regard to how the credits would be applied, Wanen then said that he would like to know if he was going to get \$190,000 for himself. Mr. Sampson's report of that incident is that, after the figures were being computed, Wanen inquired how much he was going to get out of the deal, and Mr. Rosen replied it was about \$160,000, and that Wanen then said he wanted \$190,000.

Mr. Okun's report of the second incident is that, after Wanen had said the price was \$655,000, all of a sudden there was a pull back, and there was a change in the price, and Wanen backed away and said he wanted \$190,000. Wanen's report of this moment is that, after everyone had told "all kind of goofy numbers," he told them that his price was still \$190,000 net and that he had never quoted a gross price to any of the buyers or brokers.

This evident conflict in testimony compels the evaluation of its probability and the credibility of the witnesses. In this testing we are not required to disregard our everyday knowledge of human affairs. The vast majority of sales are made upon a gross price. Of course the seller is always interested in what net return he will get, but buyers want to know what they will have to pay and expect sellers to adjust their prices in accordance with the net they want to receive. Therefore prices are nearly universally quoted in the gross.

Korman, Kasten, and Wanen are parties. They are interested witnesses, in that they have benefits to derive from the termination of this lawsuit. Kasten's testimony relates only to the preliminary negotiations in regard to price. The witnesses Roiter, Sampson, and Okun are entirely disinterested witnesses in this litigation. Its outcome cannot in any way affect any interest they have. It could not create an interest in behalf of Mr. Sampson and Mr. Okun in the property. There was no enforceable contract signed, and Mr. Roiter apparently has long since ceased to have any interest in the property. They are in fact probably the very highest type of

witness that could be obtained. Mr. Sampson and Mr. Okun were present eye-and-earwitnesses of what transpired in Wanen's lawyer's office. Their credibility is not impeached. Therefore, when Messrs. Roiter, Sampson, and Okun testified that their dealings in relation to this property were dealings in gross figures running from \$640,000 to \$655,000, that testimony carries great weight. Mr. Sampson and Mr. Okun testified that they were present at the negotiations and that, in response to Mr. Rosen, Wanen indicated that the price was \$655,000. It is a direct statement of fact by two disinterested witnesses. Against this type of evidence we have only the evidence of defendant Wanen. His interest is clear.

In addition to the customary way of pricing, the repeated use of gross pricing figures in negotiation, the direct statement of disinterested witnesses, and the interest of defendant Wanen, there are certain inherent discrepancies in Wanen's testimony which render it highly improbable. He admits he wrote to the Dollar Savings Bank re the release of his mortgage. He does not deny that he found out that there would be additional costs in such a release. He only affirms that the price was always \$200,000 or \$190,000 net to him; as far as he testifies, that was never translated into a selling price. He does not deny that he inquired from Irving Jacobs about increased costs of selling. He neither affirms or denies that the price was increased, but contents himself with the same statement relating to the net price. When the first meeting of Wanen and the prospective purchasers took place, and disinterested

witnesses said he asked for an additional \$5,000, he still says the only price ever quoted was his original net price demand, although he makes no specific denial of the demand for the extra amount charged to him. He does not deny the conversation with Mr. Rosen at the last meeting testified to by disinterested witnesses, but contents himself by saying they all "told all kind of goofy numbers," and that he had always asked \$200,000 or \$190,000 net. These and other inconsistencies give his entire testimony the lack of candor which makes it highly unbelievable.

From this analysis of the evidence it is clear to us that the evidence adduced at the trial heavily preponderates in favor of plaintiffs on the only basic point in dispute, which is the price at which the property was to be sold. There remains for us to consider whether the finding is so contrary to the manifest weight of the evidence that we are compelled to reverse the judgment and enter judgment in favor of plaintiffs. We are not unmindful of the fact that here the court had the benefit of seeing these witnesses as they testified and observing many of the incidents of trial which are not available to a court of review. This advantage is perhaps in part counterbalanced by the volume of business handled and the rush and strain under which trial courts are compelled to work. Thus we must consider that troublesome question as to what is manifest weight of the evidence.

Clearly if there is substantial evidence in favor of the finding of the court, that finding must be sustained. When the only testimony supporting defendant's position is that of defendant himself, and his interest is ipso facto self-evident, when that testimony is not corroborated in any way either by direct testimony or any circumstance surrounding the transaction involved, when

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that testimony is in every important point explicitly denied by plaintiffs, whose interest is also self-evident, when every disinterested witness contradicts defendant in every critical point and confirms the testimony of plaintiffs, when defendant's testimony is evasive and does not directly deny the testimony of plaintiffs in all material matters, when the conduct of defendant denies his spoken words in regard to collateral matters, when the testimony of defendant sets forth a transaction contrary to all the usual customs and practices of such transactions, when defendant's own testimony in regard to acts of his which would confirm that the transaction was carried on in the usual and customary manner are not explained in the light of defendant's general testimony, and it is therefore inconsistent, if not conflicting, we are compelled to feel that there is no substantial evidence which warrants a finding in favor of defendant in this case. We have in mind the phrases usually used in regard to manifest weight of the evidence, that the courts have said that an opposite conclusion must be clearly evident or that the finding must be palpably erroneous. We believe that there is not substantial evidence to support the finding of the court, and that it is palpably erroneous, and the opposite conclusion is clearly evident. Bunton v. Illinois Cent. R. Co., 15 Ill. App.2d 311; Griggas v. Clauson, 6 Ill. App. 2d 412; Borst v. Langedale, 8 Ill. App.2d 88; Thomas v. Smith, 11 Ill. App.2d 310; Olin Industries, Inc. v. Wuellner, 1 Ill. App.2d 267.

Defendant Carl P. Wanen is president of corporate defendant Wanen Catalpa Apartments, Inc. He is also a director of the corporation. He holds 244 shares of 250 shares authorized. His wife Lulu E. Wanen holds three shares and is a director and officer of the corporation. His daughter Lois Wanen, now Bloom, holds three shares of the stock of the corporation and is secretary and treasurer of the corporation. Thus he, his wife, and his daughter are all the stockholders, all the directors, and all of the officers of the corporation. The corporation owns the property involved in this litigation at the corner of Rockwell and Catalpa. Originally it was owned by the original defendant Carl Wanen and was conveyed to the corporation in consideration for the stock. The corporate by-laws provide that the president shall have general and active management of the business of the corporation. We believe that, when Carl Wanen carried on negotiations in regard to securing a purchaser for the property by plaintiffs, he was not only acting in his individual capacity, but in his capacity as president and a director of the corporation, which holds the title to the premises involved.

It has been urged that the action of Carl P. Wanen did not bind the corporation. It is to be borne in mind that the contract sued upon herein is not a contract for the sale of real estate but is a contract for the services of plaintiffs to secure a buyer for the real estate. The suit is based upon services allegedly rendered. It is fundamental that the president

of a corporation is vested with authority to carry on the ordinary business of the corporation. Bloom v. Vehon, 341 Ill. 200, at 204; Quigley v. MacQueen & Co., 321 Ill. 124, at 127. It is equally fundamental that, if the president of the corporation carries on negotiations with apparent authority to bind the corporation, and the corporation does not object to the president's actions in that regard, then the corporation is bound by the authority exercised by its president. This rule is stated in 13 Am. Jur., Corporations, section 890, at p. 870; " * * * (W)hen, in the usual course of the business of a corporation, an officer * * * is held out by the corporation or has been permitted to act for it or manage its affairs in such a way as to justify third persons who deal with him in inferring or assuming that he is doing an act or making a contract within the scope of his authority, the corporation is bound thereby, even though such officer or agent has not the actual authority from the corporation to do such an act * * *." The case of Ryan v. Dunlap, 17 Ill. 40, is cited as authority for that proposition. This principle also is upheld in Guaranty Iron & Steel Co. v. Leyden et al., 235 Ill. App. 191, at 196, and in Joy v. Ditto, Inc., 356 Ill. 348, at 357, and the same principle has been applied in regard to the authority of a person employing another to sell real estate to a man who is employed as the manager of the real estate department of an insurance company in Faulkner v. Victory Mutual Life Ins. Co., 292 Ill. App. 640, a memorandum opinion of Gen. No. 39,431, where the court said: " * * * even though defendant's agent, Dent, did

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not have actual authority to employ plaintiff to sell the property, the defendant is bound by the apparent authority which it knowingly permitted Dent to assume and exercise to the same extent that it would ^{be} by authority actually granted * * *."

In another late real estate commission case a president is presumed to have authority to bind the corporation in the absence of any evidence to the contrary. Levit v. Bowers, 2 Ill App.2d 343, at page 352.

It appears to be equally clear that, if an agent acts without the proper authority of the corporation, then the agent is personally liable. Vulcan Corp. v. Cobden Machine Works, 336 Ill. App. 394, at 400. The point is discussed and authorities reviewed in Lustig v. Hutchinson, 349 Ill. App. 120, 124 et seq.

The judgment is reversed and the cause is remanded with direction to enter judgment against the defendants in the sum of \$10,000.

REVERSED AND REMANDED
WITH DIRECTION.

FRIEND, P. J. CONCURS.

BURKE, J., DISSENTS

ABSTRACT ONLY.

OVER.

-17-

BURKE, J., DISSENTING:

The trial judge had a difficult case to decide. A careful reading of the transcript of the testimony indicates an irreconcilable conflict as to the terms under which the realty was submitted by the defendants. The court decided that the plaintiffs failed to sustain their case by a preponderance of the evidence. I cannot join in the view that the judgment of the trial judge who saw and heard the witnesses is manifestly against the weight of the evidence.

Abstract

Agenda No. 17

[illegible]

: Appeal from
: Circuit Court
: Macoupin County

20 LA^{2d} 599

Defendant-Appellee.

Plaintiffs, Richard Milo Isaacs and Iola May Isaacs Lane,
s action for damages allegedly caused by a subsidence of=
of their farm lands, which it is claimed, resulted from the
operations of defendant.

The Complaint, filed November 1, 1955 and subsequently amended, in substance, alleges that plaintiffs are the owners of a 310 acre farm in Macoupin County; that they have had an interest in and occupied said farm since June 2, 1916; that prior to the subsidence claimed, the premises were improved with a dwelling house built in 1927, which had plastered walls, substantial cement foundation, operating doors and windows and a safe, efficient chimney; that on and prior to September 1, 1954, defendant was engaged in mining coal underlying the surface of said premises and in so doing, failed to leave sufficient support for the surface and as a result thereof, the said premises were caused to sink, drop and subside a distance of 2 or 3 feet; that by

Abstract

H

STATE OF ILLINOIS
CIRCUIT COURT
THIRD DISTRICT

General No. 10202

Agenda No. 17

Richard Milo Isaac and Iola May
Isaac Lane,

Plaintiffs-Appellants,

Appeal from
Circuit Court
Macoupin County

vs.

Superior Coal Company, a corporation

Defendant-Appellee.

SO I. A. 599

CARROLL, J.

Plaintiffs, Richard Milo Isaac and Iola May Isaac Lane,

brought this action for damages allegedly caused by a subsidence of
the surface of their farm lands, which it is claimed, resulted from the
coal mining operations of defendant.

The Complaint, filed November 1, 1952 and subsequently

amended, in substance, alleges that plaintiffs are the owners of a 310
acre farm in Macoupin County; that they have had an interest in and
occupied said farm since June 2, 1916; that prior to the subsidence
claimed, the premises were improved with a dwelling house built in 1927,
which had plastered walls, substantial cement foundation, operating
doors and windows and a safe, efficient chimney; that on and prior to
September 1, 1954, defendant was engaged in mining coal underlying the
surface of said premises and in so doing, failed to leave sufficient
support for the surface and as a result thereof, the said premises were
caused to sink, drop and subside a distance of 2 or 3 feet; that by

reason of the subsidence, the said dwelling house has been cracked, split and otherwise damaged, which has reduced its use and has required the expenditure of moneys for repairs; and that the 310 acre farm has sunk and become useless for farming in three areas, totaling from 9 to 10 acres.

Defendant denied causing the subsidence as charged in the Complaint, whereupon the issues were submitted to a jury, which returned a verdict for defendant. Judgment was entered on the verdict and plaintiffs have appealed.

One of the contentions made by plaintiffs, is that the trial court erroneously permitted defendant's witnesses to testify to conditions on the farm as the same existed after the date of the filing of the suit. In a subsidence case, the plaintiff may not recover damages sustained after the commencement of his action. Morris v. Saline County Coal Co. 211 Ill. App. 178; Savant v. Superior Coal Co. 5 Ill. App. 2d 109. Under this rule, plaintiffs were necessarily restricted in their proof of damages to conditions on the property from the time of the alleged subsidence to November 1, 1955, the date upon which the suit was filed. While conceding observance of such rule was required on their part in this case plaintiffs insist that it was enforced only as to the testimony of their witnesses and was ignored as far as defendant's evidence is concerned.

On this point, plaintiffs make the general assertion that the trial court allowed all of defendant's witnesses, with one exception, to testify to conditions observed by them after the filing of

suit and that none of these witnesses testified as to conditions existing at the time of the subsidence. However, our attention is drawn only to the testimony of the witness, Enos Waters, which it is suggested, illustrates the extent to which the time element was disregarded by witnesses for defendant. This witness, who stated he went on the Isaacs farm in July, 1956, to make an appraisal thereof in connection with plaintiffs' application for a loan, gave an opinion as to the value of the farm as of September, 1954. The abstract discloses that plaintiffs did not object to this witness's testimony as to conditions he observed after the filing of the suit but moved only to strike the value given because of failure to show it was the fair, cash market value as of the time the witness saw the property. The court properly denied such motion. Plaintiffs' witnesses, Collins and Rosenthal, who first went on the land in 1957 and 1958 for the purpose of appraising same, in order to testify at the trial, described conditions which they observed and then gave opinions as to the value of the farm after the filing of the suit. Since it appears that the testimony of their own witnesses was not confined to conditions observed up to the date of the filing of the suit, plaintiffs cannot now complain of defendant's efforts to answer or rebut such testimony.

Examination of the record discloses that in each instance where it is claimed the court admitted evidence offered by defendant as to conditions observed after November 1, 1955, such proof was in

will not state any of those witnesses recalled as to conditions existing at the time of the accident. However, our attention is drawn only to the testimony of the witness, Mrs. Baker, which is suggested, illustrates the extent to which the time element was suggested by witnesses for defendant. This witness, who stated no way of the time taken in July, 1956, to make an appraisal thereof in connection with plaintiffs' application for a loan, gave an opinion as to the value of the land as of September, 1956. The abstract discloses that plaintiffs' is not object to this witness's testimony as to conditions he observed after the filing of the suit but moved only to strike the value given because of failure to show it was the fair, cash market value as of the time the witness saw the property. The court properly granted such motion. Plaintiff's witnesses, Collins and Woodruff, who first went on the land in 1957 and 1958 for the purpose of appraising land, in order to testify at the trial, described conditions which they observed and then gave opinions as to the value of the land after the filing of the suit. Since it appears that the testimony of their own witnesses was not confined to conditions observed up to the date of the filing of the suit, plaintiffs cannot now complain of defendant's efforts to answer or rebut such testimony.

Examination of the record discloses that in each instance where it is claimed the court admitted evidence offered by defendant in conditions observed after November 1, 1952, such proof was in

answer to evidence introduced by plaintiffs covering the same period of time. Furthermore, the defendant could not know the nature of the subsidence charged against it, until the suit was brought. Accordingly defendant might not be able to produce witnesses who could testify to conditions existing before the suit was begun. Necessarily defendant must call witnesses who examined the property after the nature of the alleged damages had been disclosed to it by the Complaint. For this reason alone, the testimony of such witnesses was competent. Seitz v. Coal Valley Mining Co. 149 Ill. App. 85.

It is next urged that the admission in evidence of certain photographs was prejudicial to plaintiffs' case. All of the photographs in question were taken subsequent to the filing of the suit and some of them during the trial. The basis of plaintiffs' contention on this point, is that the photographs constituted evidence and that no Illinois case holds that in defending a subsidence case, the defendant can introduce evidence as to conditions existing on the day of the trial. Plaintiffs, however, cite no case in which it has been held that photographs taken after the filing of the suit may not properly be admitted in subsidence cases.

Photographs which illustrate the subject matter of the testimony, may be received in evidence for the purpose of showing a particular situation, explaining the testimony or enabling the jury to apply the testimony more intelligently to the facts shown. Their admission is a matter within the discretion of the court. I.L.P. Evidence,

new to evidence introduced by plaintiffs covering the same period
of time. Furthermore, the defendant could not know the nature of the
evidence charged against it, until the bill was brought. Accordingly,
defendant might not be able to produce witnesses who could testify to
conditional evidence. It is not said that the bill was brought. Necessarily defendant
must call witnesses who examined the property after the nature of the
alleged charges had been stated to it by the complainant. For this
reason alone, the testimony of such witnesses was competent. Wells v.

Coal Valley Mining Co. 147 Ill. App. 32.

It is held that the admission in evidence of certain
photographs was prejudicial to plaintiffs' case. All of the photographs
in question were taken subsequent to the filing of the bill and some of
them during the trial. The basis of plaintiffs' contention on this
point, is that the photographs constituted evidence and that on Illinois
case holds that in defending a subpoena case, the defendant can intro-
duce evidence as to conditional evidence on the day of the trial.
Plaintiffs, however, cite no case in which it has been held that photo-
graphs taken after the filing of the bill may not properly be admitted

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particular situation, explaining the testimony or enabling the jury to
apply the testimony more intelligently to the facts shown. Their ad-
mission is a matter within the discretion of the court. I.L.P. Evidence.

Sec. 231; Smith v. Sanitary Dist. 260 Ill. 453; Dept. of Pub. Works v. Chi. Title & Trust Co. 408 Ill. 41.

The photographs show the portions of plaintiffs' property involved, which were the house and three areas of land including a ditch, the condition of which was in dispute. Plaintiff, Richard Isaacs identified the photographs of the house and stated that he had not repaired it and that its condition was the same at the time of the trial as in September, 1954. This witness also testified to the same effect concerning the general condition of the three alleged subsidence areas. A number of photographs show a ditch with certain vegetation growing therein. Plaintiffs' witnesses testified that there was no growth in the said ditch. These particular photographs were admissible for impeachment purposes. Again it is important to note that plaintiffs' witnesses made little, if any, attempt to confine their testimony to conditions as they existed from September, 1954 to November 1, 1955. Aside from the house, plaintiffs claimed subsidence damage to three areas of their 310 acre farm. These areas contained a total of 9 to 10 acres. The testimony of the witnesses as to the conditions existing in these several locations, which distinguished the same from the remainder of the acreage, would appear to be difficult of visualization by anyone who had not seen the property. It is understandable that the jury might experience a similiar difficulty. That this was appreciated by the trial court is evidenced by the fact that the photographs were permitted to go in evidence only for the purpose of aiding the jury in understanding

the testimony of the witnesses with reference to the areas about which they testified. We think, in admitting the photographs, the trial court remained well within the limits of its discretion in that respect.

Another point raised is that the trial court erred in instructing the jury that plaintiffs, in order to recover, were required to prove that a coal mining subsidence occurred. The basis asserted for such argument, is that because of defendant's duty to support the surface, it had the burden of proving that a subsidence was not caused by its mining operations. That it is the duty of the mining operator to support the surface, is well established in Illinois. The rule with respect thereto is concisely stated in I.L.P. Mining, Oil and Gas, Sec. 154 as follows:

"Where the ownership of, or rights in the surface of, land is in one person and the ownership of the mineral rights in such land is in another, the law is well established in Illinois that the owner of the mineral estate is under an absolute duty to the surface owner to support the surface, for a breach of which, causing damage to the surface, he must, in the absence of a specific exemption or waiver, respond in damages, regardless of the care used by the owner of the mineral estate in carrying out his mining operations, and even though he has used the most approved system of mining."

It is likewise the rule that where it is shown that a subsidence has actually occurred, the act of removing all support from the superincumbent soil is, prima facie, the cause of such subsidence.

Wilms v. Jess, 94 Ill. 464; Savant v. Superior Coal Co. Supra. In the latter case, the court said: "There was proof of a subsidence (emphasis ours) and extensive damage to the house, to the walls thereof.....

The testimony of the witnesses with reference to the areas about which they testified, as stated, in addition to the foregoing, the trial court sustained well within the limits of the discretion in such respect.

Another point raised is that the trial court erred in sustaining the jury that plaintiffs, in order to recover, were required to prove that a coal mining subsidence occurred. The point asserted for such argument, is that because of defendant's duty to support the surface, it had the burden of proving that a subsidence was not caused by its mining operations. That it is the duty of the mining operation to support the surface, is well established in Illinois. The rule with respect thereto is authoritatively stated in I.R.F. Mining, Oil and Gas, Inc.

as follows:

"Where the ownership of, or right in, the surface of land is in one person and the ownership of the mineral estate in another, the law is well established in Illinois that the owner of the mineral estate is under an absolute duty to the surface owner to support the surface, for a breach of which, resulting damage to the surface, he must, in the absence of a specific exemption or waiver, sustain in damages, regardless of the same used by the owner of the mineral estate in carrying out his mining operations, and even though he has used the most approved system of mining."

It is likewise the rule that where it is shown that a subsidence has actually occurred, the act of removing all support from the experimental well is, prima facie, the cause of such subsidence.

Allen v. Jones, 94 Ill. App. 2d 347; Superior Coal Co. v. Jones. In the latter case, the court said: "There was proof of a subsidence (settling) and extensive damage to the house, to the walls thereof....."

This proof was sufficient to make a prima facie case of subsidence due to the removal of coal."

If plaintiffs' theory were adopted, the only proof of subsidence necessary would be a showing that coal was removed from under the surface of the land. We find no authority supporting such proposition and the Complaint was apparently not drawn on such theory. The Complaint charges that defendant, in its mining operation, failed to leave sufficient support under the surface of the real estate and that, as a proximate result thereof, the said surface was caused to subside. The occurrence of a subsidence as alleged was an essential element of plaintiffs' case. The elementary principle, that a plaintiff in order to recover must prove his case as alleged in his Complaint, applies in subsidence cases the same as in other actions. Plaintiffs had the burden of proving that defendant mined under their land, that such mining was the proximate cause of the subsidence as alleged in the Complaint and that damages to the premises have resulted. 58 C.J.S. Mines and Minerals, Sec. 278.

Plaintiffs finally contend that the verdict is manifestly against the weight of the evidence. As our courts have held upon innumerable occasions, the verdict of a jury upon questions of fact, should not be disturbed unless the same appears to be manifestly and palpably against the weight of the evidence. The defendant introduced evidence tending to show that there was no subsidence to the land as

This proof was sufficient to make a prima facie case of negligence on the part of the defendant.

If Plaintiff's theory were correct, the only proof of negligence necessary would be a showing that coal was removed from the surface of the land. We find no authority supporting such position and the Defendant was accordingly not bound to show that the Complaint charges that defendant, in its mining operations, failed to leave sufficient support under the surface of the coal estate and that, as a proximate result thereof, the oil surface was caused to subside. The occurrence of a subsidence is alleged to be an essential element of Plaintiff's case. The elementary principle, that a Plaintiff in order to recover must prove his case as alleged in his Complaint, applies in negligence cases the same as in other actions. Plaintiff had the burden of proving that defendant acted negligently in that such mining was the proximate cause of the subsidence as alleged in the Complaint and that damages to the premises were proximately caused by such negligence. See 278.

Plaintiff finally contends that the verdict is manifestly against the weight of the evidence. As the facts have been upon numerous occasions, the verdict of a jury upon questions of fact should not be disturbed unless the same appear to be manifestly and palpably against the weight of the evidence. The defendant introduced evidence tending to show that there was no negligence on the part of

claimed and no damage to the farm or dwelling house as a result thereof. Thus the question as to whether defendant's mining operations caused plaintiffs' land to subside on September 1, 1954 was one of fact for the jury. Upon a careful review of the record, we are unable to say that its verdict was contrary to the manifest weight of the evidence.

The judgment of the Circuit Court of Macoupin County is affirmed.

Affirmed.

Boeth, P. J. and Reynolds, J., concur.

...and no longer as the time we dwelling house as a result
...the question as to whether defendant's alleged operations
...plaintiff's land as before on September 1, 1904 was one of fact
...the jury. Upon a careful review of the record, we are unable to say
...the verdict was contrary to the weight of the evidence.
The judgment of the Circuit Court of Henry County is

affirmed.

Attest,

Roeth, P. J. and Reynolds, J., concur.

42
47564

WINTER & HIRSCH, INC.,

Plaintiff below,

v.

CORNELIUS REDMOND,

Defendant below,

CAMPBELL MOTORS, INC.,

Counter-plaintiff below, Appellee,

v.

CORNELIUS REDMOND,

Counter-defendant below, Appellant.

A
20 I.A. 3001

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal by a minor from a judgment against him in favor of an automobile dealer, for damages sustained by the dealer because the minor repudiated an automobile sale. No brief was filed by the dealer.

The principal question is the effect of the disaffirmance of the purchase by the minor.

On February 15, 1957, Cornelius Redmond, twenty year old minor, misrepresenting his age, purchased a 1955 convertible from the dealer, Campbell Motors, Inc., using his 1951 Buick as a down payment, and executed a note and conditional sales contract for the balance of the purchase price. The dealer then sold the sales contract to Winter and Hirsch, Inc., a finance company. Within thirty days of the purchase, the dealer and an insurance company refused to make repairs, which the

minor claimed were covered by a policy of insurance included in the sale. Because of this dispute the minor refused to make any payments on the installment contract, and the automobile was repossessed within thirty days of the sale. On May 16, 1957, the minor, by written notice to the dealer and finance company, disaffirmed his purchase and requested the dealer to return his 1951 Buick, which the dealer refused to do.

Judgment by confession, in favor of the finance company, was entered against the minor purchaser. With leave of court to appear and defend, the minor filed a counterclaim against the dealer for conversion of his down payment automobile. The dealer filed a cross-complaint for damages against the minor, for age misrepresentations made at the time of the sale. The testimony as to the dealer's damages included sales tax of \$37.06 and sales commission of \$115. There was no evidence that the minor did not intend to fulfill his undertaking when the sales agreement was made.

The trial court vacated the confession judgment against the minor and dismissed the finance company suit; entered judgment for \$300, the value of the minor's automobile, in favor of the minor and against the dealer; and entered judgment for \$300 in favor of the dealer and against the minor for the damages sustained by the dealer as a result of the repudiated sale. The appeal is from the \$300 judgment against the minor..

The trial court properly recognized the right of the minor to disaffirm the contract and to recover that part of the purchase price which had been paid. (Hunter v. Egolf Motor Co., 268 Ill. App. 1 (1932).) We believe the court was in error in entering a judgment against the minor for the damages sustained by the dealer in making the sale. The minor, in the exercise of his right to disaffirm this contract, cannot be held liable for the damage suffered by the dealer. It is the rule that, except for necessities, he may disaffirm the contract and recover back the consideration paid by him, without liability for damages such as are claimed here. If it were otherwise, his right of disaffirmance could be nullified, as is attempted here. Tyda v. Reiter-Schmidt, Inc., 16 Ill. App. 2d 370 (1958); Fuller v. Pool, 258 Ill. App. 513, 517 (1930); Hunter v. Egolf Motor Co., 268 Ill. App. 1 (1932).

We believe the instant situation comes within the rule above stated. Therefore, the judgment against Cornelius Redmond and in favor of Campbell Motors, Inc., be and it is hereby reversed.

JUDGMENT REVERSED.

LEWE, P.J., and KILEY, J., CONCUR.

ABSTRACT ONLY.

84
47468

ELI ABRAMSON and ROSE ABRAMSON,

Appellees,

v.

BRIARDALE BUILDERS, INC., A Corporation of Illinois,

Appellant.

A
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

20 I.A.^{2d} 300²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs sought to recover \$3500.00 which they had deposited with defendant, the seller, as earnest money on the purchase of a home in Lincolnwood, Illinois. The sale price was \$35,000.00, to be financed partly by a \$24,000.00 mortgage loan with interest at five and one-half per cent, and the contract provided for a commission charge not to exceed two per cent. Defendant was to assist in obtaining the mortgage loan, and if it was not obtained within fifteen days from the date of the contract, the earnest money was to be refunded and the agreement canceled. The mortgage loan not having been consummated within the time limitation, plaintiffs demanded return of their deposit. Defendant declared a forfeiture thereof because of an alleged breach by plaintiffs, whereupon the latter filed suit in the Municipal Court. Trial by the court and jury resulted in a verdict for plaintiffs for \$3000.00, upon which judgment was entered. Defendant's motions for judgment notwithstanding the verdict and for a new trial, made within the

thirty-day limitation provided by Municipal Court Rules and statute, were denied. After the expiration of thirty days, plaintiffs moved for judgment non obstante veredicto, which was sustained, and judgment was entered in their favor for \$3500.00. Defendant appeals to reverse both judgments.

The essential facts disclose that in August 1956 defendant, a building contractor, had available for sale a completed house at 6866 North Crawford Avenue, Lincolnwood, Illinois. About August twentieth of that year, plaintiff, Rose Abramson, by appointment with one of defendant's officers, saw the house and arranged to have her husband view it. Five days later the Abramsons entered into a short contract to purchase it for \$35,000.00, and deposited \$1500.00 as earnest money. Later, an additional contract was prepared covering more completely the sale and purchase of the property; this was executed by the parties on either September 12 or 13, 1956. At the same time plaintiffs paid defendant an additional amount of \$2000.00, making a total earnest-money deposit of \$3500.00.

The second contract provided that defendant, the seller, would use its best efforts to procure a loan for plaintiffs in an amount not less than \$24,000.00, with interest not to exceed five and one-half per cent; that the commission charge was not to exceed two per cent; and that if the loan was not secured within fifteen days from the date of the contract, it should become null and void, and the earnest money returned. Defendant applied for a loan on September 4, 1956 at First Federal

Savings and Loan Association, and also at Percy Wilson Mortgage and Finance Corporation on September 6, 1956. On September 28, 1956 Isaac Cooper, one of defendant's officers, phoned Mrs. Abramson that a mortgage loan was available at First Federal Savings Association and asked her to go there with her husband. When she objected to the two and one-half per cent commission required by the loan association, Cooper stated that defendant would absorb one per cent of it. The mortgage statement was received in evidence, showing a proposed loan of \$24,000.00, payable in twenty years, with interest at five and one-half per cent; a commission charge of two and one-half per cent was provided.

On October 1, 1956 plaintiffs went to the First Federal Savings Association with their lawyer. Both the Abramsons testified that no mortgage papers had been prepared for signature, that Carr, the loan officer, would make no commitment for a loan. Defendant says that the loan application at Percy Wilson Company was not processed to completion because plaintiffs omitted to furnish requested financial statements, and that accordingly the application filed was canceled. However, John Fischer, an appraiser and a solicitor for Percy Wilson Company at the time, interviewed Mr. Abramson at his place of business, filled out the loan application, which was signed, and advised Abramson that, since he was self-employed, a financial statement was required; Fischer stated that it was not furnished. Defendant's Exhibit 1 indicates that "Personal Financial Statements" were

filled out by Fischer from information given to him by Abramson and signed by both plaintiffs. He testified that he "believed" he requested a further financial statement, but he was not positive on that point. Abramson, on his part, said that the man who filled out his personal financial statement wanted information about his personal affairs, and that he gave him "all the dope."

Both parties agree, as they did on trial of the case, that plaintiffs deposited \$3500.00 as earnest money. Thus, the amount of money recoverable was never in dispute; rather, the issue was as to who was entitled to that agreed sum. Considerable evidence was adduced upon the trial; the jury evidently concluded that plaintiffs had done all required of them in the way of co-operation to assist in obtaining a mortgage loan, and that since defendant had not been able to procure the loan for them it was not entitled to declare a forfeiture of the contract and to retain the earnest money. We would not be justified in holding that the verdict was contrary to the manifest weight of the evidence, as defendant claims.

Defendant argues that, since the undisputed amount of \$3500.00 was involved, plaintiffs were entitled to that amount or to nothing; and that the verdict for \$3000.00 was obviously a compromise and therefore not permissible under the law. It cites cases where verdicts were without basis under any legitimate theory or interpretation of the evidence such as *Selamakos v. Victory Ice and Ice Cream Co.*, 246 Ill. App. 178, and *Conrad Seipp Brewing Co. v. Peck*, 85 Ill. App. 637. The facts in those cases

indicate that the juries rendered capricious and arbitrary verdicts, in total disregard of the facts. We have no way of definitely ascertaining by means of the record why the jury returned a verdict for \$3000.00, when \$3500.00 was, without contradiction, the amount involved; however, defendant's counsel, in his closing argument to the jury, stated that defendant had, at considerable expense and inconvenience to itself, brought into court certain persons as its witnesses, and, as plaintiffs' counsel suggest, it may well be that the jury deducted \$500.00 as reimbursement to defendant.

There are cases in this State holding that a defendant cannot complain that a verdict was for too small an amount or for a lesser amount than plaintiff sought. *Ryan v. Harty*, 200 Ill. App. 470; *Shaffer et al. v. Natoma Farm*, 195 Ill. App. 97; *George v. Milligan*, 174 Ill. App. 529; *Central Trust Co. v. Kuglin*, 194 Ill. App. 294. The author of an article in 39 American Jurisprudence, New Trial, Section 148, states that "One cannot secure a new trial upon the ground that his opponent ought to have recovered either a greater amount or nothing," citing *Ansonia Foundry Co. v. Bethlehem Steel Co.*, 98 Conn. 501, 120 A. 307.

Defendant argues that plaintiffs waived the fifteen-day limitation of the agreement pertaining to the securing of a mortgage because they went to one of the mortgage companies at defendant's request after the expiration of the fifteen-day period. This, we think, was but another manifestation on their part to co-operate in securing a loan and should not be construed

as indicating a waiver of the contract provision.

We need not pass on defendant's contention that plaintiffs' post-trial motion was barred by lapse of time under Section 68.1 (3) of the Municipal Court Rules and Section 68.1 (3) of the Civil Practice Act (Ill. Rev. Stat., ch. 110) because plaintiffs are evidently satisfied to accept the \$3000.00 awarded them by the jury. The case was fairly tried, but for the reasons indicated the judgment for \$3500.00, entered on plaintiffs' post-trial motion, is reversed, and the cause remanded with directions to re-instate the judgment on the jury's verdict of \$3000.00.

JUDGMENT FOR \$3500.00 REVERSED
AND CAUSE REMANDED WITH DIRECTIONS
TO RESTORE THE ORIGINAL
JUDGMENT FOR \$3000.00 IN FAVOR
OF PLAINTIFFS.

BRYANT and BURKE, JJ., CONCUR.

47582

K. M. HARDEN and LUCY M. HARDEN,

Plaintiffs-Appellants,

v.

VEGA INDUSTRIES, INC., a corporation
(formerly San-Equip, Inc.).

Defendant-Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

20 I.A.^{2d} 601

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dismissing plaintiffs' amended complaint for want of equity. The cause of action had been referred to a master in chancery. The master had prepared his report, and objections had been filed thereto. The hearing before the court had been upon the master's report and the exceptions thereto. The decree therefore provided that all the exceptions to the master's report, both plaintiffs' and defendant's were overruled, and the master's report was confirmed and approved in all respects. It also provided that the master's fees and charges were taxed as costs and divided equally between plaintiffs and defendant, and judgment entered thereon. Defendant filed a cross-appeal relating to the costs taxed against it.

Prior to December, 1950, plaintiff K. M. Harden had become the owner of all the capital stock of Snap Products Corporation, an Illinois corporation. This corporation was engaged in the business of making a snap washer used to prevent leaks in faucets. The corporation was the owner of the patent on the snap washer.

At that time David H. Jaquith was the president of San-Equip, Inc., a New York corporation with offices in Syracuse, New York. K. M. Harden was in ill health in the summer of 1950, and the business of Snap Products Corporation, an Illinois corporation, was for sale. Jaquith was looking for an additional business and met the Hardens through a broker.

Preliminary negotiations were held between the parties which resulted in an offer being made on January 8, 1951, by San-Equip, Inc., by David H. Jaquith, to K. M. Harden, sole stockholder of Snap Products Corporation, whereby San-Equip offered to buy all of the stock of Snap Products Corporation for the net worth inventory of that company plus an additional amount of \$20,000. That offer was accepted on January 9, 1951, by K. M. Harden. By January 19, 1951, the net worth of Snap Products Corporation had been determined to be \$54,678.73, and on that day San-Equip paid the sum of \$74,678.73 to Harden in full payment for the stock, and the Hardens vacated the premises used by Snap Products Corporation, on Hubbard Street in Chicago, and the new owner, that is, San-Equip, took over the operation of that business on that day. Contemporaneously on January 19, 1951, K. M. Harden, the retiring president and treasurer, and his wife, Lucy M. Harden, the retiring vice-president and secretary, entered into a contract with Snap Products Corporation, an Illinois corporation, whereby Snap Products Corporation agree to employ the Hardens, both husband and wife.

The Hardens were to be available for consultation and to perform such services in connection with the development, manufacture, and sale of the products of Snap Products Corporation as might be requested by the company's president or vice-president. They were not to be precluded from other work or engaging in other business. but they were not to discuss with any person any trade secrets which they possessed in regard to the products of Snap Products Corporation, nor should they act as officers of a competing company. "As compensation and full payment for the performance of their duties and fulfilling their obligation," the Hardens were to receive the aggregate sum of \$100,000. No payment was to be made on such aggregate sum in any calendar year in which the net sales were \$50,000 or less, and the contract provided a schedule for various payments when the net sales were in excess of \$50,000, increasing as the net sales increased.

Substantially all of the assets of Snap Products Corporation were physically moved to Syracuse, New York, where San-Equip's home office was located. This transfer of assets out of the state of Illinois had been contemplated in the negotiations prior to the execution of the purchase and contract. Shortly after the closing of the transactions on January 19, 1951, the Hardens moved to California.

Soon after the transfer of the physical assets from Illinois to New York, San-Equip, a New York corporation, was advised that it was not desirable to operate Snap Products Corporation business in New York in the form of an Illinois corporation as its wholly

owned subsidiary. San-Equip had a wholly owned subsidiary New York corporation available in the Ardee Corporation. It was not actively engaged in any other business. San-Equip, Inc., then proceeded to transfer the assets and liabilities of Snap Products Corporation, an Illinois corporation, to the Ardee Corporation, a New York corporation. The Ardee Corporation then changed its name to Snap Products Corporation, and this Snap Products Corporation, a New York corporation, was a wholly owned subsidiary of San-Equip, Inc., as Snap Products Corporation, an Illinois corporation, had been.

This entire transaction, including the change of the name of the Ardee Corporation to Snap Products Corporation, was completed by January 29, 1951, ten days after the sale of the stock in Chicago.

Plaintiffs contend that their contract for employment and the payment of \$100,000 out of the net sales of Snap Products Corporation, an Illinois corporation, when said sales exceeded \$50,000 per year, was first a part of the purchase price, and was secondly non-assignable, and that the transfer of the assets to Snap Products Corporation, a New York corporation, was therefore void. They urge that Snap Products Corporation and San-Equip, Inc., thereby became trustees ex maleficio for all of the assets of Snap Products Corporation, an Illinois corporation, for the benefit of the Hardens. In support of that position plaintiffs assert that they had no notice nor knowledge of that transfer from Snap Products Corporation, an Illinois corporation, through and to Snap Products Corporation, a New York corporation.

If it should be thought that the contract of employment is a part of the purchase price, there was no definite commitment to ever pay the Hardens a dime under the contract either for services or as additional purchase price. Whatever commitment was made was predicated upon the existence of a certain amount of net sales. Therefore there could be no definite consideration for the purchase of the stock in addition to the price paid of \$20,000 in excess of the net worth.

If the contract was a personal one and was not assignable because, as it is urged, the Hardens wished to have the benefit of the particular skills of the person to whom they sold their business in its operation, as the amount to be received under the contract would somewhat reflect the skill of the purchaser and his ability to bring the net sales above \$50,000 per year, still in those transfers there had been no change in management, and the persons who were at this point in control of Snap Products Corporation in New York are exactly the same persons to whom the Hardens sold Snap Products Corporation of Illinois. If the actions of San-Equip, Inc., in these transfers created a trusteeship ex maleficio, it was completed within ten days after the execution of the sale agreement. If it was not created at that time, then the subsequent transaction of the purchaser in regard to the management would not involve any fiduciary relation to the seller. There was no provision in the contract as to methods to be used by the purchaser in operating the company or in promoting sales.

From January, 1951, Snap Products Corporation, a New York corporation, continued to operate the business which San-Equip and Jaquith had obtained from Snap Products Corporation, an Illinois corporation, by the purchase of the Harden stock. On the whole it was a successful operation. Net sales in both 1951 and 1952 were in excess of \$50,000, and amounts were paid to the Hardens under the contract. The sales were undoubtedly greatly augmented by the appearance in the Readers Digest of an article relating to this unique washer. The possibility of this article being published had been known by all the parties at the time of the sale of the stock by Harden. However, the article in the Readers Digest also called attention to another washer which achieved a similar result. It developed that the mentioning of this second washer created competition in the unique market involved. That second washer became the property of Kirkhill Rubber Company, which was a well-established organization operating in the field with a substantial sales organization and financial responsibility. The price of the competing washer was also reduced substantially below the price of the product made by Snap Products Corporation. All of these results came about without any impetus from the management of Snap Products Corporation, a New York corporation.

After it became evident that the effect of the Readers Digest article in stimulating demand was waning and that the competition developing was serious, Snap Products Corporation, a New York corporation operated by Jaquith and his interests,

spent considerable sums in the promotion of sales. It finally determined that in its opinion the money being expended was not producing satisfactory results in sales, and it discontinued its promotional efforts on the scale which it had been pursuing.

San-Equip and Snap Products Corporation, a New York corporation, still operating through Mr. Jaquith, determined in the early summer of 1952 to make efforts to find a purchaser during the summer and early fall. On July 8, 1952, Mr. Jaquith by letter advised Mr. Harden of his intention and offered to sell the business back to Mr. Harden, if he wished. Jaquith, after a thorough investigation of Harrison Industries, in November, 1952, negotiated a sale of all the assets of Snap Products Corporation of New York except the cash to Harrison Industries. The sale was entered into on November 6th. The transfer became effective on November 17, 1952.

On November 24th, Jaquith advised Harden of the sale. Harden did not object, but on December 3, 1952, wrote that he would be glad to cooperate with the new owners. On the same day Harden wrote to Harrison Industries, offering his assistance. Harrison later requested some consulting services from Harden pursuant to the contract of January 19, 1951, but such services, minor as they were, were not rendered. After December 3, 1952, Harden was in frequent contact with Harrison Industries, and Harrison Industries made reports to Harden in regard to the sales that were made. Harrison Industries also caused to be incorporated

an Illinois corporation known as Snap Products Corporation, and transferred all the assets which Harrison Industries had acquired from Snap Products Corporation, a New York corporation, to this new Illinois corporation.

The business of the original Snap Products Corporation, an Illinois corporation, the stock of which was owned by K. M. Harden and sold to San-Equip, Inc., is now being carried on by Snap Products Corporation, an Illinois corporation owned by Harrison Industries. That business has never ceased.

"Constructive trusts are divided into two classes; one where actual fraud is considered as equitable ground for raising the trust, and the other consisting of those cases in which the existence of a fiduciary relation and the subsequent abuse of the confidence reposed is sufficient to establish the trust."

Bremer v. Bremer, 411 Ill. 454, at 457. The case of Ginsberg v. Bull Dog Auto Fire Ins. Assn., 328 Ill. 571, involves the failure to comply with the assignment provisions of an insurance contract. The case of Harney v. Hellgren, 322 Ill. 126, involves the assignment of a contract for the purchase of real estate, where part of the consideration was to be in the form of notes executed by certain individuals. The case of Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379, involves the assignability of a contract where the goods were to be sold upon credit. All of these cases are cited by plaintiff, and all of them on their facts are clearly distinguishable from the instant case. All of the cases cite the famous phrase from Lord Denman: "You have the right to the benefit you anticipate from the character, credit and substance

of the party with whom you contract." Even if the facts in this case involve the personal reliance on the people with whom plaintiffs dealt, that is, Mr. Jaquith, still, the transfer of the assets from Snap Products Corporation, an Illinois corporation, to Snap Products Corporation, a New York corporation, both controlled and owned by Mr. Jaquith, could not be in violation of that principle, and the subsequent transfer to Harrison Industries and to the second Snap Products Corporation of Illinois was consented to by plaintiff.

In the case of *Fox v. Fox Valley Trotting Club*, 8 Ill. 2d 571, there was involved a lease relating to the occupancy of a certain tract of land as a track for trotting races, and a failure to use the land for that purpose. The case held that the lease must be construed that the lessee was to conduct his racing meets at the track in question. *Stoddard v. Illinois Improvement Co.*, 275 Ill. 199, involved a lease for the purpose of quarrying stone. *Daughetee v. Ohio Oil Co.*, 263 Ill. 518, involved a situation where a lessee put down a test well and found gas and then failed to exploit it. All these cases are clearly distinguishable on their facts from the instant case, in that, here, there has been no abandonment of the operation of the business of the corporation which was sold.

Here the obligation of defendant under the contract is merely to pay a certain percentage of money when net profits exceed \$50,000 per year. The personal obligation was on behalf of plaintiffs, that they would not enter into a competing business.

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The findings in the decree that plaintiffs are not entitled to the relief or any part thereof demanded in their amended complaint and the amendment thereto is justified. The order and decree dismissing plaintiffs' complaint for want of equity is affirmed.

There remains for consideration the cross-complaint relating to the master's fees. It is clearly within the court's discretion to award costs. Smith-Hurd Ill. Rev. St., Ch. 33, §18, and to apportion the costs between the parties in accordance with the justice and equity of the case. Kaufman v. Wiener, 169 Ill. 596, at 606. That power and that discretion were not abused by the lower court. Therefore the cross-appeal of defendant that the costs be taxed exclusively against plaintiffs is denied, and that portion of the order and decree is affirmed.

AFFIRMED.

FRIEND, P.J., and BURKE, J., CONCUR.

47604

LELAND-DAVID ADVERTISING INC., a
corporation,

Appellee,

v.

FETTER STORAGE WAREHOUSE CO., a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

20 I.A. 602^{1d}

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff sues to collect for television advertising from one of four joint purchasers. After a trial without a jury, the court entered a judgment for plaintiff for \$2,221.25. Defendant appeals.

On August 6, 1957, defendant, Fetter Storage Warehouse Co., and three other storage and moving corporations, authorized plaintiff, in writing, to purchase TV advertising for them, for a period of twenty-six weeks, beginning October 1, 1957. The writing detailed the time and length of the "spots," the purchase price, weekly payments to be made to plaintiff, and a cancellation option effective only at the end of the thirteenth week.

Plaintiff purchased the television time, and the advertising commenced October 1, 1957. Defendant paid for the first week, and under date of October 9, 1957, sent a notice of cancellation because of dissatisfaction with time allocations, and also, that "the whole deal was not for me. It is too vague and expensive for our type of business and operation in Chicago."

Plaintiff's complaint, filed December 4, 1957, alleged a written contract, performance, and the notice of cancellation.

Defendant answered that the writing of August 6, 1957, was not a contract because not accepted in writing by plaintiff, and that it was a continuing severable offer, which defendant cancelled upon learning of the failure of plaintiff to perform in accordance with its terms. The set forth details of the performance failures are primarily directed to time allocations and nonobservance of weekly alternating spot combinations, all of which, it is alleged, resulted in not reaching a proper audience group.

Plaintiff's evidence showed the undisputed offer joined in by defendant. Plaintiff's vice president testified he was present when the writing was signed, at which time a group representative was chosen, in accordance with the offer, who conferred with him weekly regarding the selection of time period available; that he purchased time on WBKB-TV for the four corporations; that the advertising continued for a thirteen week period, commencing October 1, 1957, and that defendant paid for the first week only, and that the other three paid in full. The comptroller of WBKB-TV produced the station log for the period in question, and testified as to the advertising time purchased by plaintiff, as required by the offer, and the shows on which it appeared. Defendant offered no evidence and, after argument, the court entered judgment for plaintiff.

The questions presented are: whether the instrument was a contract for thirteen weeks or a severable offer, revocable as to any portion unperformed; if a contract, whether plaintiff performed its obligations; whether the "cancellation" was valid;

whether defendant's answer required a reply; and whether defendant had a fair trial.

The offer in writing, not signed by offeree, ripened into a binding contract on both parties when plaintiff purchased the TV time. Defendant showed knowledge of this by its cancellation notice of October 9, 1957. Therefore, no written acceptance was required of plaintiff. It was an acceptance by engaging to perform, in a way which would bind plaintiff to complete it within the time and for the period specified. The proof showed actual performance, and the court was correct in finding the writing resulted in a contract. Star Brewery v. Farnsworth, 172 Ill. 247, 250; Plumb v. Campbell, 129 Ill. 101, 106; 12 I.L.P. 210, Contracts, §38.

This was not a contract for a series of acts to be done by plaintiff, or not, as it chose. It was for twenty-six weeks, written in firm thirteen week cycles. It also provided: "Contract is cancellable only on 28 days prior written notice by our authorized representative to Leland David Advertising Agency, Inc., at the end of the ninth week of the first thirteen week cycle." This was not a divisible weekly offer, once it was accepted. It specified, quite clearly, that it was for "firm thirteen week cycles," and plaintiff's acceptance of the offer bound it to perform. There is no language in the writing which contemplates any performance by either plaintiff or defendant short of a thirteen week cycle. This is understandable, for it is common knowledge that advertising of this sort requires much preliminary planning by both the advertiser and the medium. The question of whether any contract is entire or several must depend on the intention of the parties,

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to be ascertained from the language of the contract and the subject matter of it. If it appears that the contract is to be performed as a whole, it is an entire contract. Stannmeyer v. Davis, 321 Ill. App. 227, (1944).

Defendant's answer did not require a reply to be filed by plaintiff. The answer of defendant, as amended, was a detailed denial that plaintiff performed in accordance with the writing which defendant denied was a contract. The attempted cancellation was incorporated in the complaint, and the court was correct in finding that the answer contained no new matter requiring a reply. Where a complaint meets and negatives matter set up in an answer, no reply to the answer is necessary. Chenal v. Diersen, 330 Ill. App. 322.

The report of proceedings indicates vigorous and continued colloquy between court and counsel over the reception of evidence, and some of the objections, made principally to leading questions, were proper. However, we are of the opinion that no prejudicial error occurred in the reception of evidence, and that a new trial would not produce any different result, because of the reasons given.

The evidence of plaintiff proves the essential elements of the complaint, and for the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

LEWE, P.J., AND KILEY, J., CONCUR.

ABSTRACT ONLY.

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